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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Equal Employment Opportunity
Commission,
10 Plaintiff,
11 v.
12 Swissport Fueling, Inc.,
13 Defendant.

No. CV-10-02101-PHX-GMS
ORDER

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16 Pending before the Court is Defendant Swissport Fueling, Inc.’s (“Swissport”) Motion for Summary Judgment. (Doc. 239.) Also pending are the Equal Employment Opportunity Commission’s (the “EEOC”) Motion to Strike (Doc. 279) and Motion for Leave to File Surreply (Doc. 280). For the reasons discussed below, Swissport’s Motion for Summary Judgment is granted in part and denied in part. The EEOC’s Motion to Strike Reply is granted in part and denied in part, and its Motion for Leave to File Surreply is denied as moot.

22
23 **BACKGROUND**

24 Defendant Swissport provides fueling services to over twenty airlines at Sky Harbor Airport in Phoenix, Arizona. (Doc. 235 at ¶ 1.) Swissport hires fuelers to perform a variety of tasks at the airport, but their main job is to attach fuel lines to planes and monitor them to ensure that they receive the requisite amount of fuel. (*Id.* at ¶ 2.) During the time period relevant to this suit, Swissport employed fuelers who had emigrated from

1 various countries in Africa, including Sudan, Nigeria, Ghana, and Sierra Leone. (Doc. 1
2 at 1; Doc. 269 at 2.)

3 The EEOC brought this suit in November 2010 alleging that Swissport had
4 subjected the African fuelers to illegal and discriminatory treatment in the workplace.
5 (Doc. 1 at 1.) The EEOC alleges that Christian Pelkey, a Swissport manager, was
6 primarily responsible for the fuelers' complaints of verbal abuse, which included calling
7 the fuelers "monkey" and referring to their food as "monkey soup." (Doc. 269 at 2-3.)
8 The allegations also state that Pelkey ridiculed the fuelers' national origins, yelled and
9 cursed at them, and generally treated them more harshly than their non-African
10 counterparts. (*Id.* at 3.) The EEOC alleges that other supervisors also subjected the
11 African fuelers to racially discriminatory treatment, though not to the same extent as
12 Pelkey. (*Id.*)

13 In April 2007, a group of African fuelers signed a petition to Jim Vescio,
14 Swissport's general manager, complaining about Pelkey's racist behavior. (Doc. 266-71.)
15 Afterward, eighteen of the fuelers who had signed the petition filed charges of
16 discrimination with the EEOC, alleging harassment, disparate treatment, and retaliation.¹
17 (*See* Doc. 235-28.) The EEOC investigated these allegations over the course of the next
18 three years, requesting and receiving from Swissport over 3000 documents regarding
19 Swissport's employment practices. (Doc. 243 at 2.) Through obtaining these documents,
20 the EEOC possessed the identities and contact information for all potential class members
21 in this suit. (*Id.* at 8.) However, as discussed below, the EEOC did not disclose to
22 Swissport the identities of all the claimants on whose behalf it sought relief, and in some
23 cases did not even contact them, until after it brought suit. In June 2010, the EEOC issued
24 letters of determination ("LODs") for only the eighteen fuelers who had initially filed

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26 ¹ The fuelers who filed charges of discrimination were Michael Aba, Elguzouli
27 Abaker, William Aguek, Lewis Andoh, Emmanuel Crispo, Alhaj-Elisa Dada, Joseph
28 Gindallang, Garang Ken-Guot, Abdelmoneim Korsi, Alor Kual, Gabriel Maduok, Agot
Mil, Abraham Ngon, William Obur, Obariya Olai-Chu, Togo Peter, Foday Sillah, and
Godin Torue. (Doc. 235-28.) Garan Ken-Guot has since apparently decided not to
proceed with the case and is no longer a named claimant. (Doc. 45 at 4 n.2.)

1 charges, finding reasonable cause to believe that they had been subjected to harassment,
2 disparate treatment, and retaliation in the workplace. (Doc. 235-29.)

3 Swissport and the EEOC attempted to conciliate the unlawful practices beginning
4 in June 2010. (Doc. 235-32 at 81.) They exchanged a series of letters in which the EEOC
5 made monetary demands and Swissport responded with requests for more information
6 with which to evaluate its liability. (Doc. 269 at 42.) In these letters, the EEOC requested
7 damages on behalf of the eighteen charging parties, as well as nine unidentified class
8 members for whom reasonable cause LODs were never issued. (Doc. 235-32 at 96.) The
9 letters culminated in an in-person meeting conducted at the EEOC offices, (*id.*), but
10 conciliation ultimately failed in September 2010, (Doc. 266-94 at 1). Thereafter, the
11 EEOC filed suit against Swissport on behalf of the fuelers, alleging that since at least
12 May 2005, Swissport has engaged in unlawful employment practices such as hostile work
13 environment, failure to correct, failure to promote on the basis of race, retaliation, and
14 constructive discharge. (Doc. 1 at ¶¶ 6–11.)

15 At the scheduling conference held in this conference a number of months after the
16 EEOC filed the complaint, the EEOC identified seventeen charging parties, though it
17 indicated that it was investigating twenty additional potential claimants.² (Doc. 243 at 3.)
18 The Court granted the EEOC sixty days from the date of the scheduling conference to
19 add claimants in addition to the seventeen already identified. (Doc. 18 at ¶ 2; Doc. 243 at
20 4.) By the end of that deadline, on June 28, 2011, the EEOC had identified only nine
21 additional claimants but stated that it was now aware of seventy-five potential claimants
22 none of whom it identified.³ (Doc. 243 at 4.) It indicated, in a Motion for Extension of
23 Time filed on June 28, that in May of 2011 it had sent letters to 188 fuelers for whom
24 Swissport had provided contact information in 2008, and sought additional time to

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26 ² The seventeen initially identified claimants are the eighteen fuelers who filed
charges of discrimination with the EEOC in 2007, minus Garang Ken-Guot.

27 ³ The nine additional claimants are Stanley Imeah, Mohamed Basha, Anthony
28 Marh, Guot Aruo, Arop Majak, Constantino Lado, Yakub Turay, Emmanuel Gualue, and
William Aculey. (Doc. 45-8 at ¶¶ 18–26.)

1 investigate and identify these additional parties. (*Id.*) The Court allowed the EEOC to
2 continue its investigation on the condition that it would have to show good cause for its
3 delay in adding any claimants who were not identified by the June 28 deadline. (*Id.* at 6–
4 7.) Ultimately, the Court permitted the EEOC to add twelve claimants in addition to the
5 seventeen initially identified and the nine identified by June 28.⁴ (*Id.* at 10–18.)⁵

6 Swissport now contends that it is entitled to summary judgment on the following
7 grounds: (1) the EEOC failed to conciliate in good faith, (2) the EEOC has failed to
8 muster sufficient evidence to support the hostile work environment claims of twenty-four
9 of the twenty-six claimants, (3) Olai-Chu’s failure to promote claim is outside the scope
10 of the EEOC’s initial LOD, (4) the EEOC alleges retaliation and constructive discharge
11 claims that were not pled in the Complaint, (5) two claimants are time-barred, (6) the
12 EEOC has not met the standard for punitive damages, and (7) the EEOC does not have
13 sufficient evidence to support the unlawful retaliation claims of eight of its claimants.

14 ANALYSIS

15 I. Motion to Strike

16 With its Reply (Doc. 275), Swissport attached three appendixes: an appendix of
17 sham affidavits (Doc. 275-1), an appendix of evidentiary objections (Doc. 275-2), and an
18 appendix of misinterpretations (Doc. 275-3). Swissport also filed a Supplemental
19 Statement of Facts in Support of its Motion for Summary Judgment, (Doc. 276), along
20 with five new exhibits, in addition to the Statement of Facts and exhibits originally filed
21 with its Motion for Summary Judgment. The EEOC has moved to strike all three
22 appendixes and the Supplemental Statement of Facts. (Doc. 279.)

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24 ⁴ The twelve additional claimants permitted to be added in the May 10, 2012 order
25 are Amos Tarley, Angelo Ahawin, Wellington Pyne, Jacob Kual, David Mensah, Kweku
26 Essien, Sulaiman Kargbo, John Ruai, Angelo Ring, Salah Ahmed, Peter Adjej, and
Abdirahman Mumin. (Doc. 243 at 12–16.)

27 ⁵ As the EEOC acknowledged at oral argument, in permitting the EEOC to
28 designate the addition claimants on whose behalf it was seeking relief in this action, the
Court did not make any substantive ruling that the EEOC had appropriately fulfilled any
statutory prerequisites to asserting claims for relief on behalf of these individuals.

1 The Local Rules do not provide for additional exhibits attached to replies in
2 support of summary judgment or for a separate response to the non-moving party's
3 statement of facts. *B2B CFO Partners, LLC v. Kaufman*, 856 F. Supp. 2d 1084, 1086–87
4 (D. Ariz. 2012). “This is consistent with the moving party’s need to show no genuine
5 issue of material facts exists and that there is no need for a trier of fact to weigh
6 conflicting evidence. . . .” *Id.* (citing *EEOC v. TIN Inc.*, No. CV-06-1899-PHX-NVW,
7 2008 WL 2323913, at *1 (D. Ariz. June 2, 2008), *rev'd on other grounds*, 349 Fed. Appx.
8 190 (9th Cir. 2009)).

9 The moving party may set forth objections to the responsive statement of facts,
10 and those objections “may be set forth in a separate reply statement of facts, but that
11 filing *may not introduce new facts or evidence.*” *Larson v. United Natural Foods W., Inc.*,
12 No. CV-10-185-PHX-DGC, 2010 WL 5297220 at *2 (D. Ariz. Dec. 20, 2010) (emphasis
13 in original).

14 In response to the EEOC’s Motion to Strike, Swissport argues that this Court has,
15 in all previous cases, erroneously interpreted the Local Rules to prohibit external
16 documents submitted with replies. (Doc. 282 at 2.) Swissport argues that the language of
17 Local Rule 7.2(m)(2) supports its interpretation that external documents attached to
18 replies are, in fact, permitted. That Rule, however, states only that an objection may be
19 made to a statement of facts filed with a party’s responsive memorandum. The documents
20 attached by Swissport to its Reply go beyond objections, setting forth new statements of
21 fact and new exhibits to support those statements.

22 As discussed above, new evidence is flatly prohibited in a reply in support of
23 summary judgment. The EEOC’s Motion to Strike is therefore granted on Swissport’s
24 Supplemental Statement of Facts. Swissport’s appendix of evidentiary objections,
25 however, is permitted by Local Rule 7.2(m)(2), and the EEOC’s Motion to Strike is
26 denied as to that appendix. Conversely, Swissport’s appendix of misinterpretations
27 appears to be an attack on the weight and credibility of the testimony of the claimants in
28 this case. Swissport’s burden on summary judgment is to show that no material issue of

1 fact exists, not to dispute credibility. The appendix of misinterpretations is therefore
2 stricken. Finally, Swissport's sham appendix will be construed as an objection permitted
3 under Local Rule 7.2(m)(2), as it pertains to information allegedly previously undisclosed
4 by the EEOC. The EEOC's Motion to Strike, therefore, is granted as to the Supplemental
5 Statement of Facts and the appendix of misinterpretations, but denied as to the appendix
6 of evidentiary objections and sham appendix.

7 **II. Swissport's Evidentiary Objections**

8 Attached to Swissport's Reply are evidentiary objections to the EEOC's Statement
9 of Facts. Swissport organizes its objections into five categories: hearsay, irrelevant, vague
10 and ambiguous, lack of foundation, and speculation. (Doc. 275-2.)

11 A court may only consider admissible evidence in ruling on a motion for summary
12 judgment. *Ballen v. City of Redmond*, 466 F.3d 736, 745 (9th Cir. 2006). However,
13 objections to evidence as "irrelevant, speculative, and/or argumentative, or that it
14 constitutes an improper legal conclusion are all duplicative of the summary judgment
15 standard itself." *Harris Technical Sales, Inc. v. Eagle Test Sys., Inc.*, 06-02471-PHX-
16 RCB, 2008 WL 343260 at *3 (D. Ariz. Feb. 5, 2008) (citing *Burch v. Regents of the*
17 *Univ. of Cal.*, 433 F.Supp.2d 1110, 1120 (E.D. Cal.2006)). Since a district court may not
18 rely on irrelevant facts, legal conclusions, or speculations on a motion for summary
19 judgment in the first place, Swissport's evidentiary objections on those grounds are
20 superfluous. *See id.* In addition, objections that evidence is vague or ambiguous go to the
21 weight of the evidence, an issue that is properly before a jury. As such, it is improper to
22 exclude such evidence at the summary judgment stage. *Sluimer v. Verity, Inc.*, 606 F.3d
23 584, 587 (9th Cir. 2010).

24 Swissport objects to seventy of the EEOC's fact statements on the ground of
25 hearsay. (Doc. 275-2 at 1.) Of these, four⁶ are not supported by the evidence submitted by
26 the EEOC, so they will not be considered in this Motion for Summary Judgment.

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28 ⁶ Statements 487, 498, 826, and 963.

1 Twenty-seven are statements made by a person other than the sworn declarant and fall
2 into the category of hearsay.⁷ See Fed. R. Evid. 801(c). These twenty-seven statements
3 also will not be considered. Five of the statements objected to include statements made
4 by a person other than the declarant, but appear to be asserted for the purpose of
5 establishing Swissport's knowledge of Pelkey's behavior rather than to establish the fact
6 of Pelkey's behavior itself.⁸ As such, the Court will consider these statements, but only
7 for the limited purpose of determining Swissport's knowledge of Pelkey's behavior. The
8 remaining thirty-four statements do not appear to be hearsay, and Swissport's objections
9 to them are denied.

10 Swissport also objects to 117 of the EEOC's fact statements for lack of
11 foundation. (Doc. 275-2 at 2.) Of these objections, twenty-two⁹ overlap with the
12 legitimate hearsay objections discussed above and will not be considered in deciding this
13 Motion. One of them, Statement 498, cites to evidence that does not exist in the record,
14 and will not be considered.

15 The remainder of Swissport's objections are to statements by the fuelers that
16 generally state that Pelkey treated the African fuelers worse than he treated white or
17 Hispanic fuelers. Swissport argues that these statements lack foundation as to personal
18 knowledge because it is "impossible for an employee to make sweeping statements that
19 others were never criticized or yelled at." (Doc. 275 at 23.) However, the statements to
20 which Swissport object appear to be made on the basis of each fueler's personal
21 observations. (Doc. 264 at ¶ 535 (statement by Dodor that he did not personally hear
22 Pelkey say harassing things to white or Mexican fuelers); ¶ 548 (statement by Mil that he
23 never saw Pelkey treat the white or Hispanic fuelers the way he treated the African
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25 ⁷ Statements 441, 466, 467, 497, 781, 782, 786, 787, 788, 789, 790, 791, 792, 793,
26 794, 795, 796, 797, 799, 800, 801, 802, 803, 804, 805, 807, and 809.

27 ⁸ Statements 852, 879, 880, 888, and 892.

28 ⁹ Statements 466, 467, 786, 787, 788, 789, 790, 792, 793, 794, 795, 796, 797, 799,
800, 801, 802, 803, 804, 805, 807, and 809.

1 fuelers); ¶ 555 (statement by Olai-chu that he never heard Swissport managers insult
2 white or Hispanic fuelers); ¶ 563 (statement by Imeah that he did not see Pelkey treat a
3 white fueller in the same way Pelkey treated African fuelers); ¶ 565 (statement by Aculey
4 that he personally noticed that Pelkey treated him and the other African fuelers
5 differently than he treated the white and Hispanic fuelers); ¶ 811 (recounting an incident
6 personally involving Aba); ¶ 821–22 (describing Yusuf’s reaction to Pelkey’s behavior
7 during an incident at which Yusuf was present); ¶ 911 (statement by Torue that Pelkey
8 treated him and other African fuelers worse after a complaint was submitted); ¶ 935
9 (statement by Davison that he was in the meeting where the leave policy had changed); ¶
10 967 (statement by Korsi describing his experience in applying for a promotion); ¶ 968
11 (statement by Korsi explaining his reasons for resigning); ¶ 989–95 (describing Dodor’s
12 personal experience after he was suspended)). As a whole, it is not implausible that the
13 African fuelers may have observed Pelkey interacting with white and Hispanic fuelers
14 and noticed differences in treatment between those fuelers and themselves.

15 Swissport also appears to argue that because the fuelers often worked in isolated
16 conditions, they could not possibly know how Pelkey treated the other fuelers. The
17 logical flaw in this argument is apparent—just because the fuelers *often* worked alone
18 does not mean that the fuelers were *always* alone; indeed, a large number of the
19 allegations against Swissport involve situations where many fuelers were congregated in
20 the break room. As such, the remainder of Swissport’s evidentiary objections on the basis
21 of lack of foundation are not viable, and the Court will consider the ninety-four
22 statements that are not hearsay and not missing from the record in deciding the Motion
23 for Summary Judgment.

24 **III. Sham Affidavit Doctrine and Motion for Leave to File Surreply**

25 In its Reply, Swissport argues that the EEOC’s case should be dismissed because
26 the EEOC submitted a series of declarations by the claimants which Swissport asserts are
27 shams. (Doc. 275 at 10–12.) The EEOC seeks leave to file a surreply so that it may have
28 a chance to address Swissport’s sham affidavit argument. (Doc. 280 at 2.)

1 Pursuant to the sham affidavit doctrine, a party cannot avoid summary judgment
2 by creating “an issue of fact by an affidavit contradicting [its] prior deposition
3 testimony.” *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). Swissport
4 contends that seven of the twenty-eight declarations filed by the EEOC in support of its
5 Response are shams and that the Ninth Circuit has approved of dismissal as a sanction for
6 a party’s use of sham affidavits. (Doc. 275 at 11–12.) In fact, the only case cited by
7 Swissport in support of its position involves the Ninth Circuit upholding dismissal of a
8 case against a party that falsified depositions. *See Combs v. Rockwell Int’l Corp.*, 927
9 F.2d 486, 488 (9th Cir. 1991). None of the Ninth Circuit cases reviewed by this Court
10 addressed dismissal as a sanction for a sham.

11 In any event, it does not appear that the EEOC filed sham affidavits in this case.
12 The sham affidavit rule is applied with caution because “it is in tension with the principle
13 that the court is not to make credibility determinations when granting or denying
14 summary judgment.” *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012). The party
15 offering the affidavits “is not precluded from elaborating upon, explaining or clarifying
16 prior testimony elicited by opposing counsel on deposition.” *Van Asdale v. Int’l Game*
17 *Tech.*, 577 F.3d 989, 998–99 (9th Cir. 2009) (internal quotations omitted). Nor is an
18 affidavit a sham if it contains “minor inconsistencies that result from an honest
19 discrepancy, a mistake, or newly discovered evidence.” *Id.*

20 To justify invocation of the sham affidavit rule, “the inconsistency between a
21 party’s deposition testimony and subsequent affidavit must be clear and unambiguous.”
22 *Id.* For example, the Ninth Circuit upheld a district court striking sham affidavits where
23 the deponent could not remember the answers to approximately 185 questions in his
24 deposition, but suddenly recalled them “with perfect clarity” in his declaration submitted
25 with his response to the motion for summary judgment. *Yeager*, 693 F.3d at 1080.

26 Here, Swissport attaches a Sham Appendix setting out in chart form the
27 inconsistencies it believes demonstrate that the EEOC’s declarations are shams.
28 However, the statements in the declarations do not contradict the declarants’ previous

1 deposition testimony enough to justify applying the sham affidavit doctrine. Some
2 statements refer to inconsistencies that are immaterial, such as whether other people were
3 present when Pelkey made a particular statement. (Doc. 275-1 at 1.) Other statements are
4 found in declarations by declarants who were never deposed, and thus have no prior
5 testimony to contradict. (*Id.* at 2, 6, 7.) Still more statements have no apparent
6 contradiction to deposition testimony; Swissport argues that these statements are
7 contradictory because the incidents they describe were not mentioned in the declarants'
8 depositions. Though a glaring lack of memory can lead to a finding that an affidavit is a
9 sham, as in *Yeager*, the omissions by the declarants here do not rise to the extreme level
10 of forgetfulness exhibited by the declarant in that case. The declarants appeared merely to
11 have struggled in their depositions to remember events that occurred many years ago. As
12 such, the Court is reluctant to attribute to the declarants the malicious state of mind that
13 undergirds the sham affidavit rule. The EEOC's Complaint will not be dismissed on the
14 ground that it submitted sham affidavits, and the twenty-eight declarations submitted by
15 the EEOC will be considered in deciding the motion for summary judgment. In light of
16 this, it is not necessary for the EEOC to file a surreply to address the sham affidavit
17 argument, and the EEOC's Motion for Leave to File Surreply is denied as moot.

18 **IV. Motion for Summary Judgment**

19 **A. Legal Standard**

20 Summary judgment is appropriate if the evidence, viewed in the light most
21 favorable to the nonmoving party, shows "that there is no genuine issue as to any material
22 fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
23 Only disputes over facts that might affect the outcome of the suit will preclude the entry
24 of summary judgment, and the disputed evidence must be "such that a reasonable jury
25 could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477
26 U.S. 242, 248 (1986). "[A] party seeking summary judgment always bears the initial
27 responsibility of informing the district court of the basis for its motion, and identifying
28 those portions of [the record] which it believes demonstrate the absence of a genuine

1 issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

2 A court must grant summary judgment if the pleadings and supporting documents,
3 viewed in the light most favorable to the nonmoving party, “show that there is no genuine
4 issue as to any material fact and that the moving party is entitled to judgment as a matter
5 of law.” Fed. R. Civ. P. 56(c); *see Celotex*, 477 U.S. at 322–23; *Jesinger v. Nev. Fed.*
6 *Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which
7 facts are material, and “[o]nly disputes over facts that might affect the outcome of the suit
8 under the governing law will properly preclude the entry of summary judgment.”
9 *Anderson*, 477 U.S. at 248; *see Jesinger*, 24 F.3d at 1130. In addition, the dispute must be
10 genuine, that is, the evidence must be “such that a reasonable jury could return a verdict
11 for the nonmoving party.” *Anderson*, 477 U.S. at 248. Because “[c]redibility
12 determinations, the weighing of the evidence, and the drawing of legitimate inferences
13 from the facts are jury functions, not those of a judge, . . . [t]he evidence of the
14 nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor” at
15 the summary judgment stage. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S.
16 144, 158–59 (1970)); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) (“Issues of
17 credibility, including questions of intent, should be left to the jury.”) (citations omitted).

18 Furthermore, the party opposing summary judgment “may not rest upon the mere
19 allegations or denials of [the party’s] pleadings, but . . . must set forth specific facts
20 showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *see Matsushita Elec.*
21 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Brinson v. Linda Rose*
22 *Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995); *Taylor v. List*, 880 F.2d 1040, 1045
23 (9th Cir. 1989); *see also* LRCiv. 1.10(l)(1) (“Any party opposing a motion for summary
24 judgment must . . . set[] forth the specific facts, which the opposing party asserts,
25 including those facts which establish a genuine issue of material fact precluding summary
26 judgment in favor of the moving party.”). If the nonmoving party’s opposition fails to
27 specifically cite to materials either in the court’s record or not in the record, the court is
28 not required to either search the entire record for evidence establishing a genuine issue of

1 material fact or obtain the missing materials. *See Carmen v. S.F. Unified Sch. Dist.*, 237
2 F.3d 1026, 1028–29 (9th Cir. 2001); *Forsberg v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409,
3 1417–18 (9th Cir. 1988).

4 **B. Hostile Work Environment**

5 Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment
6 practice for an employer . . . to discriminate against any individual with respect to his
7 compensation, terms, conditions, or privileges of employment, because of such
8 individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1);
9 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Title VII guarantees “the right to
10 work in an environment free from discriminatory intimidation, ridicule, and insult.”
11 *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) (quoting *Meritor Sav.*
12 *Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). Thus, “a workplace in which racial
13 hostility is pervasive constitutes a form of discrimination.” *Id.* (quoting *Woods v. Graphic*
14 *Comm’ns*, 925 F.2d 1192, 1200 (9th Cir. 1991)).

15 To determine whether conduct was sufficiently severe or pervasive to violate Title
16 VII, a court must consider “all the circumstances, including the frequency of the
17 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or
18 a mere offensive utterance; and whether it unreasonably interferes with an employee’s
19 work performance.” *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003)
20 (quoting *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71, *reh’g denied*, 533
21 U.S. 912 (2001)). In addition, “[t]he working environment must both subjectively and
22 objectively be perceived as abusive.” *Id.* However, the allegations of hostile conduct are
23 to “be assessed from the perspective of a reasonable person belonging to the racial or
24 ethnic group of the plaintiff.” *McGinest*, 360 F.3d at 1115.

25 Swissport asserts that it is entitled to summary judgment for two reasons: (1) the
26 conduct alleged by the EEOC was not racial in nature, and (2) the conduct was not severe
27 enough to constitute a hostile work environment. Swissport also argues that the EEOC’s
28 burden is to present evidence of each element of the hostile work environment claim for

1 each individual claimant, rather than presenting evidence of a hostile work environment
2 existing in the aggregate. (Doc. 239 at 4–6.) Swissport cites an array of cases from
3 outside of the Ninth Circuit in support of this argument. (*See id.* at 5.) The EEOC does
4 not expressly dispute this claim, but appears to present its evidence of hostile work
5 environment in the aggregate, rather than establishing the elements for each individual
6 claimant.

7 Neither the Ninth Circuit nor the District of Arizona has expressly spoken on the
8 issue of the EEOC’s burden when prosecuting a hostile work environment claim on
9 behalf of multiple claimants. However, courts in this district have analyzed the EEOC’s
10 hostile work environment claims on a claimant-by-claimant basis in the past. *See*
11 *E.E.O.C. v. Love’s Travel Stops & Country Stores, Inc.*, 677 F. Supp. 2d 1176, 1187 (D.
12 Ariz. 2009) (analyzing the two claimants individually); *E.E.O.C. v. GLC Restaurants,*
13 *Inc.*, No. CV 05-0618-PCT-DGC, 2006 WL 3052224 (D. Ariz. Oct. 26, 2006) (analyzing
14 six claimants individually). The Court is of the view that such an approach is required.
15 Thus, the Court will analyze the EEOC’s evidence to see whether it meets its burden to
16 overcome summary judgment for each claimant individually.

17 Swissport’s first argument is that the alleged harassment consisted solely of
18 comments that the claimants were eating monkey soup or statements that even a monkey
19 could adequately do the jobs assigned to the claimants. (Doc. 239 at 7.) Swissport asserts
20 that there is nothing inherently racial about the term “monkey,” and thus there is no
21 discrimination on the basis of race as prohibited by Title VII. However, the two cases
22 cited by Swissport do not support the conclusion that, as a matter of law, the term
23 “monkey” used towards African individuals is racially neutral. Swissport’s cases refer
24 only to the term in the context of the phrase “monkey-on-your-back.” *See Gregory v.*
25 *Widnall*, 153 F.3d 1071, 1074–75 (9th Cir. 1998); *Ross v. Pfizer, Inc.*, 375 Fed. Appx.
26 450, 454 (6th Cir. 2010). Conversely, other courts have found that term to hold racial
27 connotations. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1297 (11th Cir. 2012);
28 *Green v. Franklin Nat’l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006); *White v.*

1 *BFI Waste Svcs., LLC*, 375 F.3d 288, 298 (4th Cir. 2004). Therefore, a material issue of
2 fact exists as to whether the Swissport employees' use of the word "monkey" in various
3 contexts toward the claimants constituted racial discrimination.

4 Swissport further asserts that it is entitled to summary judgment as to twenty-four
5 of the claimants on whose behalf the EEOC is seeking relief on a hostile work
6 environment claim because they heard Pelkey make monkey comments too infrequently.
7 In making this argument, Swissport only points to evidence in the record that thirteen
8 claimants did not hear Pelkey's comments frequently enough to raise a hostile work
9 environment claim. (Doc. 239 at 9.) As such, Swissport has not met its burden on
10 summary judgment as to the remaining eleven claimants for whom Swissport made no
11 individual argument. Its Motion for Summary Judgment is denied as to those claimants.¹⁰

12 In *Vasquez v. County of Los Angeles*, the Ninth Circuit found that two offensive
13 remarks combined with allegations of unfair treatment were not severe or pervasive
14 enough to create a hostile work environment. 349 F.3d at 644. In *Sanchez v. City of Santa*
15 *Ana*, the Ninth Circuit upheld a district court's decision that no hostile work environment
16 existed where "the employer posted a racially offensive cartoon, made racially offensive
17 slurs, targeted Latinos when enforcing rules, provided unsafe vehicles to Latinos, did not
18 provide adequate police backup to Latino officers, and kept illegal personnel files on
19 plaintiffs because they were Latino." *Id.* at 643 (citing *Sanchez v. City of Santa Ana*, 936
20 F.2d 1027, 1031, 1036 (9th Cir. 1990)). Conversely, evidence that a plaintiff was subject
21 to "several racial incidents . . . each year" over a period of ten to fifteen years, "ranging in
22 severity from being called racially derogatory names to experiencing a potentially life-
23 threatening accident" is sufficient to create a material issue of fact on a motion for
24 summary judgment. *McGinest*, 360 F.3d at 1118.

25 Swissport points to evidence in the record that two claimants, Ngon and Turay, did
26 not hear Pelkey make any monkey comments at all. (Doc. 239 at 9.) It points to other

27
28 ¹⁰ The claimants for which Swissport makes no individual argument are Gindallang, Kual, Maduok, Mil, Obur, Peter, Imeah, Basha, Aruo, Lado, and Aculey.

1 evidence that ten of the claimants¹¹ only heard Pelkey make monkey comments a
2 maximum of three times.¹² Being subject to an offensive term, even a racial slur, on three
3 separate occasions does not, as a matter of law, reach the level of severity sufficient to
4 create an issue of fact as to whether a hostile work environment existed. Though three
5 racially denigrating comments may be degrading and disturbing to the listener, they do
6 not reach the level of racial hostility exhibited in *Sanchez*, where a few instances of
7 racially offensive slurs were compounded with disparate and illegal treatment. The facts
8 of *Sanchez*, which were much more extreme than the behavior alleged by the EEOC in
9 this case, were insufficient to create a hostile work environment as a matter of law.
10 Swissport has therefore met its burden of demonstrating that there is no material issue of
11 fact as to whether a hostile work environment existed for the claimants at their fueling
12 jobs. The burden now falls on the EEOC to point to evidence in the record that the hostile
13 conduct in the workplace was more severe and pervasive than as shown by the evidence
14 presented by Swissport.

15 The EEOC alleges generally that the actions of Pelkey and the other Swissport
16 supervisors created a pervasively hostile work environment. (Doc. 269 at 10–11.) The
17 EEOC does not make individual arguments regarding the claimants, but instead points to
18 over one hundred statements of fact that it claims create a genuine issue of material fact
19 as to the issue of whether a hostile work environment existed. However, the many fact
20 statements cited to by the EEOC do occasionally raise an issue of fact as to the individual
21 claimants. *See McGinest*, 360 F.3d at 1103, 1115 (“Repeated derogatory or humiliating
22 statements can constitute a hostile work environment.”) (citing *Ray v. Henderson*, 217
23 F.3d 1234, 1245 (9th Cir. 2000)) (internal quotations omitted).

24
25 ¹¹ Dada, Crispo, Abaker, Korsi, Sillah, Aguek, Gualue, Majak, Marh, and Aba.

26 ¹² Swissport also argues that it is entitled to summary judgment on Olai-Chu’s
27 claim of hostile work environment because Olai-Chu testified that the only harassment he
28 felt was Swissport’s failure to promote him. However, the evidence in the record to
which Swissport cites was not attached. As such, its Motion for Summary Judgment as to
Olai-Chu’s hostile work environment claim is denied.

1 Dada testified that he heard Pelkey make monkey soup comments to him or other
2 African fuelers twenty times. (Doc. 266-12 at 35:14–25, 36:4–8.) Every time Pelkey
3 spoke to him it was “in a very disrespectful, insulting way,” but Dada never saw Pelkey
4 speak to white or Hispanic fuelers in this way. (Doc. 266-48 at ¶ 4.) Gualue declared that
5 he interacted with Pelkey frequently, (Doc. 266-51 at ¶ 3), and that Pelkey treated him
6 and the other African fuelers like they “weren’t even human,” (*id.* at ¶ 8). Furthermore,
7 every time Pelkey saw Gualue and the other African fuelers in the break room or eating
8 their meals, he would ridicule them and their food. (*Id.* at ¶ 4.) Marh declared that he and
9 the other African fuelers were frequently subjected to Pelkey’s screaming, yelling, and
10 cursing, but that he never saw Pelkey treat white or Hispanic fuelers this way. (Doc. 266-
11 58 at ¶¶ 4, 7.) Every time Marh interacted with Pelkey, Pelkey spoke in a “harassing
12 brutal manner” and would refer to Marh and other African fuelers as “You Africans” or
13 “monkey.” (*Id.* at ¶ 4.) There was also an incident in which Pelkey showed Marh a video
14 of a monkey and compared the video to the African fuelers. (*Id.* at ¶ 5.) Aba declared that
15 Pelkey almost always referred to the African fuelers as monkeys, and that he saw Pelkey
16 almost every day. (Doc. 266-40 at ¶¶ 4–5.) He also declared that Pelkey made comments
17 about the African fuelers’ food many times. (*Id.* at ¶ 8.) Turay declared that his
18 supervisors regularly gave him and other African fuelers more difficult jobs while
19 favorably treating white and Hispanic fuelers, and that his supervisors and co-workers
20 frequently made fun of his food by calling it “monkey soup.” (Doc. 266-68 at ¶¶ 4–7.)

21 These incidents are sufficient in frequency and severity to create a material issue
22 of genuine fact as to the hostile work environment claims of Dada, Gualue, Marh, Aba,
23 and Turay. Evaluating these incidents from the perspective of an objective person
24 belonging to the ethnic group of the claimants, a reasonable jury could find that the
25 conduct to which these fuelers were subjected was degrading and abusive. Furthermore,
26 the EEOC has presented evidence that the claimants subjectively found the conduct
27 offensive. (*See* Docs. 266-48 at ¶ 5; 266-51 at ¶¶ 5, 10; 266-58 at ¶¶ 5, 7, 8; 266-40 at ¶¶
28 5, 8; 266-68 at ¶ 8) (presenting declarations from the claimants stating that Pelkey’s

1 statements made them feel less valuable than white or Hispanic fuelers, like they were
2 less than human, or like they were slaves to Swissport). The EEOC has successfully
3 pointed to evidence in the record creating a material issue of fact as to whether there was
4 a hostile work environment toward the African claimants at Swissport. Swissport's
5 Motion for Summary Judgment is therefore denied as to Dada, Gualue, Marh, Aba, and
6 Turay.

7 With regard to the remaining claimants, the EEOC asserts that "a supervisor's
8 harassment toward one employee can contribute to a hostile working environment for
9 other employees, even if they are not directly exposed to all, or even most, of the
10 harassment." (Doc. 269 at 15.) It is true that "[o]ffensive comments do not all need to be
11 made directly to an employee for a work environment to be considered hostile." *Davis v.*
12 *Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008). However, the EEOC does not cite
13 to any cases in which a hostile work environment was found based *only* on offensive
14 comments made to persons other than the claimant. In each case where the Ninth Circuit
15 considered evidence of offensive comments made to others, the plaintiff was also
16 personally subjected to racist comments or actions. *Woods v. Graphic Commc'ns*, 925
17 F.2d 1195, 1202 (9th Cir. 1991) (plaintiff subjected to "several racial remarks and
18 hostility" on top of "racial jokes, cartoons, comments, and other forms of hostility
19 directed at almost every conceivable racial and ethnic group" at the workplace); *Johnson*
20 *v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1123 (9th Cir. 2008) (plaintiff subject to
21 a colleague uttering a racial slur and moving as if to strike him, as well as another
22 coworker repeatedly requesting that he take the trash out because she thought it was
23 "funny," along with evidence that the hiring committee screened an applicant out on the
24 basis of race, though plaintiff was not present during those remarks).

25 The EEOC submits evidence that the remaining claimants heard from other fuelers
26 that Pelkey made monkey comments toward those fuelers. (Docs. 266-60 at ¶ 5 (Ngon
27 Decl.); 266-47 at ¶ 7 (Crispo Decl.); 266-53 at ¶ 7 (Korsi Decl.); 266-66 at ¶ 5 (Sillah
28 Decl.); 266-43 at ¶ 4, 8 (Aguiek Decl.); 266-57 at ¶ 8 (Majak Decl.).) The fact that this

1 evidence can be *considered* in determining whether a hostile work environment exists
2 does not mean that it is sufficient to raise a genuine issue of material fact. The individual
3 claimants who heard about Pelkey’s monkey comments from other fuelers were
4 themselves subjected to little or no other racial hostility. (*See, e.g.*, Docs. 266-60 at ¶ 4
5 (Ngon never heard Pelkey make racial comments to him personally); 266-53 at ¶ 5 (Korsi
6 was subjected to monkey soup comments in the break room “a few times”); 266-66 at ¶ 4
7 (Sillah was subjected to a monkey soup comment once)). Even in combination with the
8 reports that they heard from other fuelers about racially discriminatory treatment, the
9 evidence cannot support a hostile work environment claim for these claimants.

10 In sum, Swissport’s Motion for Summary Judgment is denied as to claimants
11 Gindallang, Kual, Maduok, Mil, Obur, Peter, Imeah, Basha, Aruo, Lado, Aculey, Olai-
12 Chu, Dada, Gualue, Marh, Aba, and Turay. However, its Motion is granted as to
13 claimants Ngon, Crispo, Abaker, Korsi, Sillah, Aguek, and Majak.

14 C. Improper Expansion of Claims

15 While the EEOC is empowered by Congress to bring suit on behalf of private
16 parties, it is “required by law to refrain from commencing a civil action until it has
17 discharged its administrative duties.” *Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432
18 U.S. 355, 369 (1977). There are certain steps that must be taken before the EEOC may
19 pursue litigation. *See* 42 U.S.C. § 2000e–5(b). These include: (1) the private party’s filing
20 of a charge within, at most, 300 days of the Title VII violation, (2) the EEOC’s service of
21 that charge on the employer, (3) the EEOC’s investigation into the charge and
22 determination of whether reasonable cause exists to believe that the charge is true
23 (usually by issuing a LOD), and (4) an attempt to conciliate the violation between the
24 employee and employer. *Id.*; *Occidental Life Ins.*, 432 U.S. at 359.

25 The Ninth Circuit has stated that a district court’s subject matter jurisdiction over
26 an EEOC action extends only to claims that either “fell within the scope of the EEOC’s
27 *actual* investigation or an EEOC investigation which *can reasonably be expected* to grow
28 out of the charge of discrimination.” *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1100

1 (9th Cir. 2002) (emphasis in original) (internal citations omitted). However, the language
2 of the EEOC charge out of which the claims must arise are construed “with utmost
3 liberality since they are made by those unschooled in the technicalities of formal
4 pleading.” *Id.* Though claims of new discrimination can arise during reasonable
5 investigation of the filed charge, the new claim must “be the subject of an EEOC
6 ‘reasonable cause’ determination to be followed by an EEOC offer of conciliation.”
7 *E.E.O.C. v. Hearst Corp., Seattle Post-Intelligencer Div.*, 553 F.2d 579, 580 (9th Cir.
8 1976).

9 Swissport contends that it is entitled to summary judgment on the retaliation
10 claims of Aguek and Obur, as well as Olai-Chu’s failure to promote claim and Korsi’s
11 constructive discharge claim, because the EEOC failed to give Swissport reasonable
12 notice of these claims. Swissport extensively cites a recent Eighth Circuit case, *E.E.O.C.*
13 *v. CRST Van Expedited, Inc.*, in support of its claim. 679 F.3d 657 (8th Cir. 2012). In
14 *CRST*, the Eighth Circuit affirmed the district court’s dismissal of the EEOC’s claims as
15 to sixty-seven claimants because: (1) the EEOC did not investigate the specific
16 allegations of those claimants until after the Complaint was filed, (2) it did not identify
17 those sixty-seven claimants as members of its “class” until after the Complaint was filed,
18 (3) it did not make a reasonable-cause determination as to the specific allegations of those
19 claimants until after the Complaint was filed, and (4) the EEOC did not attempt to
20 conciliate the claimants’ allegations prior to filing the Complaint. *Id.* at 673–74. *CRST*
21 thus stands, at least in part, for the proposition that the EEOC cannot pursue claims of
22 which it failed to give the defendant notice during its investigation.

23 In response, the EEOC spends eight pages of its brief arguing that its pre-litigation
24 actions are not subject to judicial review. It may be true that the EEOC’s investigation
25 and conciliation efforts are committed to EEOC discretion by law, or that neither the
26 reasonable cause determination nor the conciliation results constitute “final agency
27 action,” but this argument misses the mark. Swissport seeks to have this Court review not
28 the correctness of the EEOC’s determinations but rather whether it discharged its

1 administrative duties that are a prerequisite to seeking judicial relief. Whether the EEOC
2 fulfilled its statutory prerequisites to suit is a proper issue for the Court to decide.
3 *E.E.O.C. v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982).

4 Swissport contends that it is entitled to summary judgment on Aguek's claim of
5 retaliatory failure to promote because, although Aguek's LOD stated that the EEOC had
6 reasonable cause to find that Swissport retaliated against Aguek, it failed to state the
7 factual basis for the finding. (Doc. 239 at 15.) However, the LOD itself states that
8 Swissport retaliated against Aguek for complaining about the discriminatory treatment to
9 which he and the other African fuelers were subjected. (Doc. 235-29 at 25.) Swissport
10 takes issue with the fact that the EEOC did not state with specificity what the retaliatory
11 action was. However, Swissport cites no case stating that such specificity is required in
12 order for the LOD to constitute "notice," and the Court's review of the case law reveals
13 no such requirement. Indeed, this Court and others have held that the EEOC's LODs need
14 not reach the level of specificity demanded by the employer. *See E.E.O.C. v.*
15 *Collegeville/Imagineering*, No. CV-05-3033-PHX-DGC, 2007 WL 2051448 at *9 (D.
16 Ariz. July 16, 2007); *E.E.O.C. v. GMRI, Inc.*, No. 1:08-CV-02214, 2009 WL 2151788 at
17 *7 (N.D. Ohio July 16, 2009); *E.E.O.C. v. Thomas Dodge Corp. of N.Y.*, 524 F. Supp. 2d
18 227, 237-38 (E.D.N.Y. 2007). As such, Swissport's Motion for Summary Judgment as to
19 Aguek's claim of retaliation is denied.

20 Swissport also contends that it is entitled to summary judgment on Obur's claim of
21 retaliatory termination because it was never disclosed in the LOD. (Doc. 239 at 15.)
22 Swissport's assertions on this ground are incorrect. In fact, both Obur's initial charge and
23 the EEOC's subsequent LOD for Obur expressly allege and assert retaliatory termination.
24 (Doc. 235-28 at 15; 235-29 at 47.) Swissport has thus failed to meet its initial burden and
25 its Motion for Summary Judgment as to Obur's claim of retaliation is denied. Swissport
26 further asserts that the retaliation claims of seven other claimants are fatally flawed for
27
28

1 the same reason as Obur's.¹³ As discussed above, Obur's retaliation claim is not flawed in
2 the manner suggested by Swissport. In addition, Swissport cites to no portion of the
3 record in making this argument against these seven claimants. Moreover, the Court's
4 independent review of the record shows that, for every single one of these claimants, a
5 claim of retaliation was asserted either in the initial charge or the LOD. (Doc. 235-28 at
6 12; *id.* at 17; Doc. 235-29 at 41; *id.* at 21; *id.* at 37; *id.* at 43; *id.* at 45; *id.* at 51; *id.* at 55.)
7 Swissport's Motion for Summary Judgment as to these retaliation claims is therefore
8 denied.

9 Swissport further contends that it is entitled to summary judgment on Olai-Chu's
10 claim of racially motivated failure to promote claim. It points to the absence of any
11 suggestion of a failure to promote claim in either Olai-Chu's initial charge or the LOD
12 subsequently issued by the EEOC; indeed, Olai-Chu's LOD asserted only a finding of
13 reasonable cause for harassment and disparate treatment. (Doc. 235-29 at 49.) In
14 response, the EEOC argues that the disparate treatment reasonable cause finding
15 encompasses the failure to promote claim. (Doc. 269 at 38.) It also contends that, in the
16 process of its investigation, it requested information from Swissport pertaining to
17 promotions, and that this was sufficient to put Swissport on notice of the failure to
18 promote claim. (*Id.*) The EEOC points to a letter in which the EEOC requested promotion
19 information from February 13, 2008. (Doc. 266-97 at 1.) There is sufficient evidence to
20 create a material issue of fact as to whether Olai-Chu's claim of failure to promote grew
21 out of the EEOC's reasonable investigation of his initial charge of discrimination.
22 Moreover, while Olai-Chu's LOD does not expressly state a finding for "failure to
23 promote," it does expressly state a finding for disparate treatment. "Failure to promote is
24 a common manifestation of disparate treatment." *McGinest*, 360 F.3d at 1122.
25 Swissport's Motion for Summary Judgment on this ground therefore is denied.

26
27 ¹³ Swissport claims that it is entitled to summary judgment on the retaliation
28 claims of Torue, Aba, Korsi, Maduok, Mil, Peter, and Ngon for the same reasons that it
set out for Obur's retaliation claim. (Doc. 239 at 15 n.8.)

1 Swissport also contends that it is entitled to summary judgment on Korsi's
2 constructive discharge claim. Swissport points to Korsi's initial charge and LOD, neither
3 of which mentions a constructive discharge claim. (Doc. 235-28 at 10; Doc. 236-29 at
4 37.) Therefore, the burden shifts to the EEOC to point to some evidence in the record that
5 it had put Swissport on notice of Korsi's constructive discharge claim. The EEOC does
6 not address Korsi's claim at all in its Response. Swissport's Motion for Summary
7 Judgment as to Korsi's constructive discharge claim is therefore granted.

8 Swissport finally contends that it is entitled to summary judgment on all retaliation
9 claims besides Olai-Chu's failure to promote claim and Andoh's constructive discharge
10 claim. (Doc. 239 at 16.) Swissport states that because these are the only two retaliation
11 claims pled in the Complaint, the EEOC is barred from bringing any other claims. Again,
12 Swissport's assertions on this ground are incorrect. The Complaint alleges that Swissport
13 retaliated against the Claimants and includes a non-exhaustive list of five actions taken
14 by Swissport that allegedly constituted illegal retaliation. (Doc. 1 at ¶ 10.) Swissport's
15 Motion for Summary Judgment is denied on this ground.

16 **C. Olai-Chu's Failure to Promote Claim**

17 Swissport asserts that it is entitled to summary judgment on Olai-Chu's failure to
18 promote claim because it offered Olai-Chu a promotion in 2008 which Olai-Chu turned
19 down. (Doc. 239 at 23.) However, the EEOC appears to base its failure to promote claim
20 on a different incident that occurred in 2007. (Doc. 269 at 24.)

21 Because failure to promote claims are disparate treatment claims, they are
22 governed by the burden-shifting framework established in *McDonnell Douglas Corp. v.*
23 *Green. Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002) (citing *McDonnell*
24 *Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Under *McDonnell Douglas*, a plaintiff
25 "can make out a prima facie case of discrimination by showing that (1) he belongs to a
26 statutorily protected class, (2) he applied for and was qualified for an available position,
27 (3) he was rejected despite his qualifications, and (4) after the rejection, the position
28 remained available and the employer continued to review applicants possessing

1 comparable qualifications.” *Id.* On summary judgment, the plaintiff need only submit a
2 “minimal” amount of proof to establish the prima facie case. *Id.*

3 The establishment of the prima facie case “creates a rebuttable presumption that
4 the employer unlawfully discriminated against the employee.” *Id.* (internal quotations
5 omitted). The burden then shifts to “the employer to articulate a legitimate,
6 nondiscriminatory reason for the plaintiff’s rejection.” *Id.* (internal quotations omitted).
7 The employer must “clearly set forth . . . the reasons for the plaintiff’s rejection.”

8 The parties agree that Olai-Chu belongs to a racial minority (specifically, that he is
9 Black and Nigerian), and that he is therefore a member of a protected class. (*See* Doc.
10 266-63 at ¶ 3.) The EEOC sets forth evidence that Olai-Chu applied for a supervisor
11 position in 2007, (Doc. 266-30 at 46, ¶¶ 3–5), that he received positive performance
12 reviews prior to applying, (Doc. 266-92), but that he was not selected for the position,
13 (Doc. 266-30 at 48, ¶¶ 5–7.). It also points to evidence that, during Olai-Chu’s interview
14 for the supervisor position, Pelkey stated that Africans were not entitled to pay or
15 promotions, and that they were not educated. (Doc. 266-30 at 67, ¶¶ 15–22). In addition,
16 it cites to evidence that after the interview, Pelkey told Olai-Chu that Africans were not
17 made for the supervisor positions because they were slaves. (Doc. 266-30 at 69, ¶ 17–70,
18 ¶ 8.) It further points to evidence that after Olai-Chu’s interview, a white fueler was
19 selected for the supervisor position. (Doc. 266-30 at 48, ¶¶ 14–21.) This evidence is
20 sufficient to establish a prima facie case under the *McDonnell Douglas* framework. The
21 burden therefore shifts to Swissport to state a legitimate and nondiscriminatory reason for
22 its failure to promote Olai-Chu.

23 Swissport does not argue that it had a nondiscriminatory reason for failing to
24 promote Olai-Chu. Instead, it asserts that the EEOC’s failure to promote claim arising
25 from the 2007 incident was never made a subject for conciliation, and thus that the EEOC
26 may not now bring a claim based on that incident. (Doc. 275 at 18.) This assertion is
27 based on the fact that Olai-Chu’s LOD only mentions “disparate treatment” and makes no
28 reference to a failure to promote claim. (Doc. 235 at ¶ 174.) However, as discussed

1 above, failure to promote is a type of disparate treatment. *See* Section IV.B, *supra*.
2 Swissport points to no other parts of the record that show that the disparate treatment
3 claim was not conciliated.

4 Swissport does not assert any legitimate and nondiscriminatory reason for its
5 failure to promote Olai-Chu in 2007, and has thus failed to overcome the EEOC's
6 establishment of a prima facie case for disparate treatment. The Motion for Summary
7 Judgment on Olai-Chu's failure to promote claim is denied.

8 **D. Retaliation Claims**

9 Swissport contends that it is entitled to summary judgment on all the individual
10 claimants' retaliation claims because it has nondiscriminatory reasons for all of its actions
11 and the EEOC is unable to point to sufficient evidence of pretext to defeat its Motion for
12 Summary Judgment. (Doc. 239 at 23–24.)

13 Retaliation claims are evaluated using the same *McDonnell Douglas* burden-
14 shifting framework discussed above. "To make out a prima facie case of retaliation, an
15 employee must show that (1) he engaged in a protected activity; (2) his employer
16 subjected him to an adverse employment action; and (3) a causal link exists between the
17 protected activity and the adverse action." *Ray*, 217 F.3d at 1240. Once the plaintiff
18 establishes a prima facie retaliation claim, "the burden shifts to the defendant to articulate
19 a legitimate nondiscriminatory reason for its decision." *Id.* "If the defendant articulates
20 such a reason, the plaintiff bears the ultimate burden of demonstrating that the reason was
21 merely a pretext for a discriminatory motive." *Id.*

22 An adverse employment action is defined as "any adverse treatment that is based
23 on a retaliatory motive and reasonably likely to deter the charging part or others from
24 engaging in protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1242–43 (9th Cir.
25 2000). The action must be "tangible" and represent a "significant change in employment
26 status." *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 960 (9th Cir. 2004). It
27 includes "lateral transfers, unfavorable job references, and changes in work schedules."
28 *Ray*, 217 F.3d at 1243. However, actionable retaliation does not include trivial

1 employment actions that would not deter employees from complaining about Title VII
2 violations. *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000)

3 Though Swissport asserts that it is entitled to summary judgment on all the
4 retaliation claims being brought by the EEOC, it only makes arguments as to six of the
5 claimants—Torue, Aba, Korsi, Andoh, Ngon, and Aguek. Thus, Swissport’s Motion for
6 Summary Judgment is denied for the remaining claimants asserting retaliation, because it
7 failed to meet its initial burden of showing no material issue of fact regarding their
8 claims.¹⁴

9 The parties do not dispute that the claimants asserting retaliation claims engaged
10 in protected activity when they complained to Swissport’s general manager about
11 workplace discrimination and when they filed charges with the EEOC. (Doc. 269 at 17.)
12 Instead, they disagree about whether each claimant was subjected to an adverse
13 employment action and whether a causal link existed between the protected activity and
14 the alleged adverse action.

15 1. **Godwin Torue**

16 Swissport argues that it is entitled to summary judgment on Godwin Torue’s
17 retaliation claim because Torue suffered no adverse employment action. (Doc. 239 at 24–
18 25.) Swissport points to the fact that, while Torue felt that he was wrongfully denied
19 promotions, (Doc. 235-37 at 45, ¶¶ 13–19), he never actually applied for a promotion,
20 (*id.* at 150, 10–11). In response, the EEOC does not present any evidence that Swissport
21 failed to promote Torue in retaliation for his protected activity, but points to other
22 evidence of retaliation that took place after Torue and the other fuelers complained. It
23 presents evidence that Pelkey more frequently called Torue into work on his days off,
24 that he checked Torue’s paperwork more carefully, and that he behaved more angrily
25 towards Torue after the complaint. (Doc. 266-67 at ¶ 12.)

26
27 ¹⁴ The EEOC asserts retaliation claims on behalf of Aba, Andoh, Korsi, Maduok,
28 Mil, Torue, Ngon, and Aguek. Swissport’s Motion is therefore denied as to Maduok and
Mil.

1 This Court has held that neither more careful scrutiny of a claimant’s work nor
2 hostile body language constitutes an adverse employment action capable of supporting a
3 claim of retaliation. *See Anderson v. Ariz.*, No. CV06-00817-PHX-NVW, 2007 WL
4 1461623 at *8 (D. Ariz. May 16, 2007) (finding no adverse employment action where
5 supervisor began nitpicking employee’s work after she engaged in protected activity);
6 *Morton v. ALS Services USA Corp.*, No. CV 11-00946-PHX-DGC, 2012 WL 3578857 at
7 *4 (D. Ariz. Aug. 20, 2012) (finding no adverse employment action where co-worker
8 physically intimidated employee by “getting into her physical space). Here, the EEOC’s
9 allegations of the adverse employment actions are not more severe than the allegations in
10 *Anderson* and *Morton*. Even if taken as true, the allegations of Pelkey’s more careful
11 scrutiny of Torue’s work and his angrier body language do not constitute a “significant
12 change in employment status.”

13 However, the EEOC also sets forth evidence that after Torue and the other fuelers
14 submitted the complaint letter, Pelkey would more frequently call Torue on his days off
15 and tell him that he had to come in to work. (Doc. 266-67 at ¶ 12.) If Pelkey made these
16 calls with sufficient frequency, and if Torue actually felt compelled to work on his days
17 off, a jury could find that Pelkey’s actions were a “change in work schedule” that
18 constituted an adverse employment action. The EEOC has raised a material issue of
19 genuine fact as to whether Pelkey retaliated against Torue by calling him to come into
20 work on his days off. As such, Swissport’s Motion for Summary Judgment on Torue’s
21 retaliation claim is denied as it pertains to the allegation that Torue was more frequently
22 called in to work on his days off.

23 **2. Michael Aba**

24 Swissport contends that it is entitled to summary judgment on Michael Aba’s
25 claim because Aba never suffered any adverse employment action. It is undisputed that
26 Otis Williams, the new general manager, told Aba that he was investigating Aba for
27 allegedly encouraging other employees to file false workers’ compensation claims, but
28 that Aba was never placed on leave or otherwise disciplined. (Docs. 239 at 25; 269 at 18.)

1 The parties agree that the investigation ended a week later with Williams telling Aba “to
2 forget about the situation.” (Doc. 269 at 18.) Swissport contends that this is insufficient to
3 constitute adverse employment action.

4 The EEOC, in response, argues that the adverse employment action was not the
5 investigation but rather the fact that Pelkey falsely accused Aba to drum up an
6 investigation against him. (*Id.* at 18–19.) However, being the subject of an investigation
7 is not a “significant change in employment status.” An investigation that resulted in a
8 finding that the employee committed no wrongdoing would not deter that employee from
9 complaining about Title VII violations. The Ninth Circuit has held that a supervisor’s
10 initiation of an administrative inquiry is insufficient to support a finding of the requisite
11 causal link without evidence showing that the supervisor’s bias tainted the inquiry and
12 affected the subsequent adverse employment decision. *Poland v. Chertoff*, 494 F.3d 1174,
13 1183 (9th Cir. 2007). Thus, only the subsequent adverse employment decision constitutes
14 action sufficient to support a retaliation claim; the inquiry itself does not suffice. As such,
15 because the EEOC’s evidence does not create a material issue of fact that Aba suffered an
16 adverse employment action, Swissport’s Motion for Summary Judgment is granted.

17 **3. Abdelmoneim Korsi**

18 Swissport seeks summary judgment on Abdelmoneim Korsi’s claims of
19 retaliation, asserting that Korsi suffered no adverse employment action within a time
20 frame sufficiently close to the protected activity to meet the requisite causal link.

21 The EEOC puts forth three instances of alleged adverse employment action by
22 Swissport: (1) reducing Korsi’s overtime hours, (2) denying Korsi a promotion, and (3)
23 constructively discharging Korsi. (Doc. 269 at 19–20.)

24 A reduction in hours constitutes an adverse employment action. *Ray*, 217 F.3d at
25 1243 (holding that a change in schedule constitutes an adverse employment action).
26 Swissport points to evidence in the record that Korsi worked approximately 275 overtime
27 hours in the six months prior to filing the complaint of discrimination, but worked 626
28 overtime hours in the six months after the filing. (Doc. 235-3 at ¶¶ 11–12.) In opposition,

1 the EEOC presents evidence that in the six months after Korsi filed his charge of
2 discrimination, his overtime hours were reduced from sixty hours per pay period to forty
3 hours per period. (Doc. 266-53 at ¶ 11.) A material issue of fact exists as to whether
4 Korsi's overtime hours were reduced in the six months following the filing of the
5 complaint. As such, Swissport's Motion for Summary Judgment is denied.

6 Failing to promote an employee also constitutes an adverse employment action.
7 *Brooks*, 229 F.3d at 928 (holding that "refusal to consider for promotion" is an adverse
8 employment action). However, to support the requisite causal link, the adverse
9 employment action must occur "fairly soon after the employee's protected expression."
10 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (internal
11 quotations omitted). Here, the EEOC does not dispute that the denial of Korsi's
12 promotion occurred ten months after his filing of his charge of discrimination. (Doc. 239
13 at 27.) A ten-month lapse between the protected activity and the adverse employment
14 action is too long to support the requisite causal link. *Id.* (citing with approval cases that
15 found lapses of eight months to be too long to support the requisite causal link).
16 Swissport's Motion for Summary Judgment is therefore granted on Korsi's retaliation
17 claim based on the failure to promote.

18 Finally, the EEOC points to Korsi's constructive discharge as evidence of an
19 adverse employment action. A constructive discharge occurs when "working conditions
20 deteriorate, as a result of discrimination, to the point that they become sufficiently
21 extraordinary and egregious to overcome the normal motivation of a competent, diligent,
22 and reasonable employee to remain on the job to earn a livelihood and to serve his or her
23 employer." *Brooks*, 229 F.3d at 930. The EEOC bases Korsi's constructive discharge
24 claim on the above-listed reduction in overtime hours and Swissport's failure to promote
25 Korsi. A reduction in overtime hours does not, as a matter of law, constitute an
26 "extraordinary and egregious" circumstance that would compel a reasonable employee to
27 leave a job. Nor is a denial of a promotion a sufficiently extreme condition to support a
28 constructive discharge claim. *See Poland*, 494 F.3d 1174, 1185-86 (finding no

1 constructive discharge although employee was transferred from supervisory to non-
2 supervisory position and forced to take an extended separation from his family). As such,
3 Swissport's Motion is also granted on any retaliation claim by Korsi based on
4 constructive discharge.

5 **4. Lewis Andoh and Abraham Ngon**

6 Swissport contends that it is entitled to summary judgment on the retaliation
7 claims of Lewis Andoh and Abraham Ngon because they never suffered any adverse
8 employment action. Swissport contends that the only adverse action Andoh and Ngon
9 suffered was an alleged change in Swissport's leave policy that detrimentally affected the
10 African fuelers. Swissport points to evidence that the leave policy never in fact changed.
11 (Docs. 235-38 at 110, ¶¶ 5-10; 235-39 at ¶¶ 4-9.)

12 In response, the EEOC argues that even if Swissport's written policy did not
13 change, it was inconsistently enforced. It sets forth evidence of an unwritten change in
14 the personal leave policy that disparately impacted African fuelers. (Doc. 266-13 at 149,
15 ¶ 12-150, ¶ 17.) It also cites to evidence that a Swissport manager abruptly denied
16 Andoh's leave request the day before Andoh was scheduled to fly to Africa, despite
17 having reassured Andoh that "everything will be fine" on the request for the previous
18 four months. (Docs. 266-5 at 43, ¶ 18-44, ¶ 24; 266-44 at ¶¶ 6-7.) The denial occurred in
19 August 2007, shortly after Andoh and some other fuelers submitted a complaint letter to
20 Swissport's general manager. (Doc. 266-44 at ¶ 5.) In addition, the EEOC points to
21 evidence that Ngon was told that Swissport would not let him take leave "like [they]
22 normally do" and that he would have to resign if he wanted to use the plane ticket he had
23 purchased. (Doc. 266-60 at ¶¶ 7-8.) Ngon also signed the complaint letter in May 2007
24 and his leave request was denied a few months later in October. (*Id.* at ¶¶ 6-7.)

25 A discriminatory change in the leave policy constitutes an adverse employment
26 action that would deter employees from taking protected action. The EEOC has
27 demonstrated that a material issue of fact exists regarding whether Swissport
28 discriminatorily denied leave to Andoh and Ngon in retaliation for signing the complaint

1 letter. As such, Swissport’s Motion for Summary Judgment is denied for their claims.

2 Swissport also contends that it is entitled to summary judgment on Andoh’s
3 constructive discharge claim. As stated above, a constructive discharge occurs when
4 “working conditions deteriorate, as a result of discrimination, to the point that they
5 become sufficiently extraordinary and egregious to overcome the normal motivation of a
6 competent, diligent, and reasonable employee to remain on the job to earn a livelihood
7 and to serve his or her employer.” *Brooks*, 229 F.3d at 930.

8 Here, the EEOC has presented evidence that Andoh was repeatedly assured that
9 his leave request would be granted and not told until the day before he was scheduled to
10 leave that his request was denied. (Docs. 266-5 at 43, ¶ 18–44, ¶ 24; 266-44 at ¶¶ 6–7.)
11 Andoh was expressly told that he had to choose between resignation and forfeiting his
12 vacation plans and the plane ticket he had already bought. (Doc. 266-44 at ¶¶ 7–8.) The
13 EEOC has also presented evidence that Swissport’s denials of fuelers’ leave requests
14 discriminatorily impacted African fuelers. (Doc. 266-13 at 149, ¶ 12’–150, ¶ 17.) A
15 reasonable jury could find that these circumstances were “sufficiently extraordinary and
16 egregious” to overcome Andoh’s motivation to continue earning a livelihood to serve
17 Swissport. Swissport’s Motion is therefore denied as to Andoh’s constructive discharge
18 claim.

19 Swissport also argues that it is entitled to summary judgment as a general matter
20 on any claims of retaliation based on a change in the personal leave policy. (Doc. 239 at
21 30.) Swissport asserts that the EEOC cannot rely on any change in the personal leave
22 policy because this change was never mentioned in any charge of discrimination or LOD.
23 However, as discussed above in Section IV.C, neither the charges nor the LODs must
24 reach the level of specificity demanded by the employer. The charges and the LODs
25 alleged that Swissport retaliated against its employees, which is sufficient to support the
26 EEOC’s current claims of retaliation.

27 Swissport also contends that the EEOC cannot rely on a change in the leave policy
28 because the policy never changed. Swissport points to the same evidence as above that its

1 written leave policy stayed the same during the time of the alleged retaliatory acts. (Doc.
2 235-38 at 110, ¶¶ 5–10.) However, as discussed above, the EEOC has presented evidence
3 that an unwritten change occurred in which leave for African fuelers was not granted as
4 freely as before. (Doc. 266-13 at 149, ¶ 12–150, ¶ 17.) This creates a material issue of
5 fact as to whether the leave policy was discriminatorily used against the claimants as
6 retaliation for signing the complaint letter.

7 Swissport further asserts that, to the extent the EEOC is claiming that the
8 individual denials of leave requests constitute retaliation, general manager Jim Vescio
9 had a nondiscriminatory reason for denying those requests. (Doc. 239 at 32.) Swissport
10 points to testimony from Vescio that sometimes staffing issues or operational difficulties
11 would force him to refuse requests for leave. (Doc. 235-2 at 72, ¶ 14–73, ¶ 14.) As stated
12 above, however, the EEOC has presented evidence that the change resulted in the African
13 fuelers disproportionately being denied leave, (Doc. 266-13 at 149, ¶ 12–15, ¶ 17), and in
14 two cases it has presented evidence that the leave was denied shortly after the requesting
15 employee engaged in protected activity, (Docs. 266-44 at ¶ 5; 266-60 at ¶¶ 6–7). Based
16 on these facts, a reasonable juror could find that Swissport’s denials of leave were
17 motivated by a desire to retaliate against employees who had signed a complaint letter,
18 rather than by nondiscriminatory staffing issues. Swissport’s Motion for Summary
19 Judgment on this ground is therefore denied.

20 **5. William Aguek**

21 Swissport contends that it is entitled to summary judgment on William Aguek’s
22 retaliation claim. Swissport does not dispute that Aguek was denied a promotion, and that
23 the denial occurred shortly after Aguek engaged in protected activity by signing a
24 complaint letter addressed to Swissport’s general manager. (Doc. 239 at 30.) These facts
25 are sufficient to make a prima facie case of retaliation. The burden thus falls on Swissport
26 to articulate a legitimate, nondiscriminatory reason for failing to promote Aguek.

27 Swissport asserts that the only adverse employment action Aguek suffered was
28 being passed over for a promotion, and that the promotion was instead given to Ngon,

1 another fueler who had signed the complaint letter. (*Id.*) This evidence is insufficient to
2 overcome the EEOC's establishment of a prima facie case of retaliation. It tends to
3 suggest that Swissport did not act with discriminatory intent, but it is not an articulation
4 of a legitimate reason for failing to promote Aguek, which is what Swissport must put
5 forth to meet its burden under the *McDonnell Douglas* framework. *Ray*, 217 F.3d at 1240.
6 The Court cannot draw out a legitimate rationale for Swissport's failure to promote
7 Aguek from evidence of Swissport's nondiscriminatory intent. Swissport's burden was to
8 state some legitimate reason, such as Aguek's poor performance or Ngon's superior
9 qualifications, for denying Aguek a promotion. It has not met that burden, so its Motion
10 for Summary Judgment on Aguek's retaliation claim is denied.

11 **E. Timely Filing**

12 Swissport avers that it is entitled to summary judgment on the claims of Yakub
13 Turay and Emmanuel Gualue because their claims are stale. (Doc. 239 at 32.)

14 Any plaintiff wishing to bring a claim under Title VII must file a charge of
15 discrimination with the EEOC within, at most, 300 days of the alleged Title VII violation.
16 42 U.S.C. § 2000e-5(e)(1); *see also E.E.O.C. v. GLC Rests., Inc.*, CV 05-0618 PCT-
17 DGC, 2006 WL 3052224 at *2 (D. Ariz. Oct. 26, 2006) (citing *Nat'l R.R. Passenger*
18 *Corp. v. Morgan*, 536 U.S. 101, 116–17 (2002)). If a claim is not filed within this time
19 period, it is time-barred. *Morgan*, 536 U.S. at 109. There is, however, an exception to this
20 requirement, called the single-filing rule, which allows a claimant who never filed a
21 charge to “piggyback” his claim onto the suit of a party alleging similar discriminatory
22 treatment. *U.S. E.E.O.C. v. NCL Am. Inc.*, 504 F. Supp. 2d 1008, 1011 (D. Haw. 2007).
23 For the single-filing rule to apply, the claim must be one that the claimant could have
24 brought by the time the initial charge was filed. *U.S. E.E.O.C. v. Dillard's Inc.*, No. 08-
25 CV-1780-IEG PCL, 2011 WL 2784516 at *8 (S.D. Cal. July 14, 2011) (citing *Domingo*
26 *v. New England Fish Co.*, 727 F.2d 1429, 1442 (9th Cir. 1984)). Thus, the act of
27 discrimination comprising the claim must have occurred in the 300 days prior to the date
28 of the filing of the initial charge. *Id.*

1 Swissport points to evidence that the first charge of discrimination was filed with
2 the EEOC on May 29, 2007. (Doc. 235-28 at 17.) As such, for the EEOC to bring a claim
3 on behalf of any fueler who did not file a charge, that fueler must have been subjected to
4 an act that was part of a hostile work environment within the 300-day window preceding
5 May 29, 2007—that is, an act occurring after August 1, 2006. Swissport then presents
6 evidence that both Gualue and Turay terminated their employment with Swissport before
7 that date. It points to Gualue’s deposition, where he stated that he resigned on October
8 17, 2005, and Turay’s deposition, where he stated that he left Swissport in January 2006.
9 (Docs. 235-15 at 57:7–12; 235-21 at 14:24–15:5.) Thus, Swissport asserts that Gualue
10 and Turay could not have suffered any discriminatory acts during the 300-day window in
11 question because they were not employed by Swissport during that time.

12 In response, the EEOC contends that it is not subject to the 300-day time window
13 because it is asserting hostile work environment claims on behalf of Gualue and Turay,
14 and hostile work environment claims are subject to the continuing violation theory. (Doc.
15 259 at 25.) It argues that “the entire time period of the hostile work environment may be
16 considered by a court for the purposes of determining liability, even if some
17 discriminatory acts occurred outside the filing period.”

18 In *National Railroad Passenger Corporation v. Morgan*, the Supreme Court held
19 that the unique nature of hostile work environment claims permitted acts that fell outside
20 of the time frame could be considered so long as one act that constituted part of the
21 hostile work environment fell within the time frame, and altogether the acts could be
22 considered part of the same hostile work environment claim. 536 U.S. at 117. However,
23 the EEOC does not point to any evidence in the record that a discriminatory act against
24 Gualue or Turay occurred during the 300-day window in this case as would allow the
25 Court to consider other acts that occurred outside the window.

26 The EEOC may be arguing that because discriminatory acts against *some*
27 *claimants* occurred during the time window, it is permitted to bring suit on behalf of other
28 claimants, on the theory that the same hostile work environment affected all the

1 claimants. That theory, however, has already been rejected by this Court. *GLC Rests.*,
2 2006 WL 3052224 at *2–*3. “*Morgan* stands solely for the proposition that under an
3 individual hostile work environment theory, an employer may be liable for acts of
4 harassment *against the same individual plaintiff* that occurred before the filing period.”
5 *E.E.O.C. v. Custom Cos., Inc.*, No. 02 C 3768, 2004 WL 765891 at *4 (N.D. Ill. Apr. 7,
6 2004) (emphasis in original). The argument that the EEOC may bring claims on behalf of
7 any claimant that experienced a hostile work environment, so long as one act against one
8 claimant fell within the proper time period, is “unsupported by existing case law.” *GLC*
9 *Rests.*, 2006 WL 3052224 at *3.

10 The EEOC finally asserts that the time limits in the statute do not apply to it
11 because it is not seeking relief “on behalf” of the individual claimants. The statute
12 requires the charge of discrimination to “be filed by or on behalf of the person aggrieved
13 within three hundred days after the alleged unlawful employment occurred.” 42 U.S.C. §
14 2000e-5(e)(1). The EEOC apparently contends that because it is neither an aggrieved
15 person nor a party suing on behalf of an aggrieved person, it is not governed by the time
16 limits. It cites to a case in which the Supreme Court recognized that “the EEOC does not
17 stand in the employee’s shoes.” *E.E.O.C. v. Waffle House*, 534 U.S. 279, 297 (2002).
18 There, the Supreme Court held that the EEOC is not bound by certain limitations that
19 would apply to individual plaintiffs, like having to satisfy Rule 23 requirements for class
20 certification or having to abide by an arbitration agreement signed by an employee. *Id.* at
21 298.

22 Here, however, the statute expressly states that it applies to charges filed by the
23 individual plaintiff *or* charges filed by parties seeking relief on behalf of wronged
24 individuals. The EEOC contends that nothing in 42 U.S.C. § 2000e-5(f)(1), the statute
25 allowing the EEOC to bring suit, says that the EEOC’s suit is “on behalf of” other
26 individuals. The Court rejects this claim. Multiple courts have found that the EEOC is
27 bound by the time limits set out in § 2000e-5(e)(1). *See GLC Rests.*, 2006 WL 3052224 at
28 *3; *E.E.O.C. v. Cal. Psychiatric Transitions*, 644 F. Supp. 1249, 1264–65 (E.D. Cal.

1 2009); *Dillard's*, 2011 WL 2784516 at *9. “Nothing in Title VII indicates that Congress
2 intended to allow the EEOC to revive otherwise stale individual claims.” *Dillard's*, 2011
3 WL 2784516 at *9 (internal quotations omitted). As such, the EEOC is time-barred from
4 asserting claims on behalf of Gualue and Turay. Swissport’s Motion for Summary
5 Judgment is granted on their claims.

6 **F. Punitive Damages**

7 Swissport contends that it is entitled to summary judgment on the matter of
8 punitive damages because it engaged in good faith efforts to comply with the law. (Doc.
9 239 at 34.) 42 U.S.C. § 1981a(a)(1) permits a party to recover punitive damages against
10 an employer who engaged in unlawful intentional discrimination. § 1981a(b)(1) provides
11 that punitive damages may be recovered when the party demonstrates that the employer
12 “engaged in a discriminatory practice . . . with malice or with reckless indifference to the
13 federally protected rights of an aggrieved individual.”

14 The Supreme Court has stated that an award of punitive damages does not require
15 a showing of egregious conduct on the part of the employer. *Kolstad v. Am. Dental Ass’n*,
16 527 U.S. 526, 534–35 (1999). Rather, the employer must “discriminate in the face of a
17 perceived risk that its actions will violate federal law.” *Id.* at 536. “[I]n general,
18 intentional discrimination is enough to establish punitive damages liability.” *Passantino*
19 *v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515 (9th Cir. 2000).

20 Swissport asserts that it cannot be held liable for punitive damages if it “shows
21 that it engaged in good faith efforts to comply with the law.” (Doc. 239 at 34.)
22 Swissport’s description of the law is not entirely accurate. According to the Supreme
23 Court, “an employer may not be vicariously liable for the discriminatory employment
24 decisions of managerial agents where those decisions are contrary to the employer’s
25 ‘good-faith efforts to comply with Title VII.’” *Kolstad*, 527 U.S. at 545. Merely having
26 anti-harassment policies in place is not sufficient; rather, the employer must actively
27 implement those policies. *Swinton v. Potomac Corp.*, 270 F.3d 794, 810–11 (9th Cir.
28 2001). Punitive damages are available if “a supervisor who . . . was responsible under

1 company policy for receiving and acting upon complaints of harassment failed to take
2 action to remedy the harassment.” *Id.* at 810.

3 Swissport points to evidence that it maintained a written harassment policy, that it
4 advised employees of the policy, and that it maintained an 800 number for employees to
5 anonymously call and report harassment. (Doc. 239 at 35.) Swissport maintains that this
6 is evidence of its good faith effort to comply with Title VII. However, Swissport must
7 present evidence that its policies were actually implemented, not merely that they were in
8 place. *See Swinton*, 270 F.3d at 810.

9 In response, the EEOC points to evidence that Pelkey and other Swissport
10 managers engaged in discriminatory and racist behavior. (Docs. 266-40-69.) It also
11 points to evidence that while management was aware that this behavior was occurring,
12 they never did anything to stop it. (Docs. 21 at 73:10-21; 31 at 10:20-11:12, 27:25-28:5;
13 38 at 142:2-13.) Based on this evidence, a reasonable jury could find that Swissport
14 discriminated in the face of a perceived risk that its actions might violate federal law.
15 Swissport’s evidence of its policies, without evidence that they were actually
16 implemented, does not overcome the EEOC’s showing. Swissport’s Motion for Summary
17 Judgment on punitive damages is therefore denied.

18 **G. Pre-litigation Obligations**

19 Swissport contends that it is entitled to dismissal of all claims that the EEOC
20 failed to investigate or identify in its letters of determination. It also contends that it is
21 entitled to dismissal of all claims based on the EEOC’s failure to conciliate in good faith.

22 **1. Availability of Judicial Review**

23 The EEOC argues that summary judgment should be denied on this ground
24 because its pre-litigation actions are not subject to judicial review. (Doc. 269 at 29-34.) It
25 cites *Ward v. E.E.O.C.* for this proposition. 719 F.2d 311. In *Ward*, the Ninth Circuit held
26 that an employee had no cause of action against the EEOC for its “negligence or inaction
27 in the internal processing of a complaint” because that was not a reviewable agency
28 action under the APA. *Id.* at 313. There, the EEOC had found no reasonable cause to

1 believe a Title VII violation occurred and declined to file suit. Thus, *Ward* can be
2 distinguished from this case. While the EEOC's investigatory and conciliatory
3 obligations, standing alone, may be immune from judicial review, the Ninth Circuit has
4 held that once the EEOC begins litigation, its investigation, determination, and
5 conciliation are subject to judicial review as "jurisdictional conditions precedent to suit."
6 *Pierce Packing*, 669 F.2d at 608.¹⁵

7 Whether the EEOC fulfilled its statutory duties as a precondition to suit is a proper
8 issue for the district court to decide. *See Cal. Psychiatric Transitions*, 644 F. Supp. 2d at
9 1267 ("Analysis of this issue begins with an examination of the prerequisites to suit by
10 the EEOC and the scope of claims the EEOC is empowered to assert."); *High Speed*
11 *Enter.*, 2010 WL 8367452 at *2-3 (analyzing the EEOC's pre-suit obligations);
12 *Collegeville/Imagineering*, 2007 WL 2051448 at *2-3 (same). The Administrative
13 Procedure Act does not bar this Court from determining as a matter of law whether the
14 EEOC satisfied its statutory duties. "To rule to the contrary would severely undermine if
15 not completely eviscerate Title VII's 'integrated, multistep enforcement procedure.'"
16 *E.E.O.C. v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2009 WL 2524402 (N.D.
17 Iowa Aug. 13, 2009) (quoting *Occidental Life Ins.*, 432 U.S. at 355).

18 **2. Pre-litigation Obligations**

19 As stated above, the EEOC must discharge certain administrative duties before
20 commencing a civil action. *Occidental Life Ins.*, 432 U.S. at 369. These duties are: (1) the
21 filing of a charge alleging a Title VII violation, (2) service of that charge on the
22 employer, (3) the EEOC's investigation and issuance of a letter of determination, and (4)
23 a conciliation attempt. 42 U.S.C. 2000e-5(b); *Occidental Life Ins.*, 432 U.S. at 359. The

24
25 ¹⁵ *Pierce Packing's* holding that the EEOC's pre-litigation obligations are
26 jurisdictional has likely been abrogated by the Supreme Court in *Arbaugh v. Y&H*
27 *Corporation*. 546 U.S. 500 (2006). There, the Court held "when Congress does not rank a
28 statutory limitation on coverage as jurisdictional, courts should treat the restriction as
nonjurisdictional in character." *Id.* at 503. However, as explained below, courts have
continued to treat the EEOC's pre-litigation obligations as statutory preconditions to suit,
if not jurisdictional preconditions. *See E.E.O.C. v. Agro Distrib., LLC*, 555 F.3d 462, 469
(5th Cir. 2009).

1 Ninth Circuit has stressed the importance of a reasonable cause determination and
2 conciliation as prerequisites to suit by the EEOC. *EEOC v. Pierce Packing Co.*, 669 F.2d
3 605, 608 (9th Cir. 1982).

4 The EEOC is not limited to pursuing only the claims identified in its original
5 charge of discrimination; rather, the EEOC can bring a civil suit “for any discrimination
6 stated in the charge itself or discovered in the course of a reasonable investigation of that
7 charge.” *E.E.O.C. v. Hearst Corp., Seattle Post-Intelligencer Div.*, 553 F.2d 579, 580 (9th
8 Cir. 1976). Nor is the EEOC limited to bringing suit only behalf of those individuals who
9 were identified in the initial charge. *E.E.O.C. v. Evans Fruit Co., Inc.*, No. CV-10-3033-
10 LRS, 2012 WL 1899194 at *3 (E.D. Wash. May 24, 2012); *Cal. Psychiatric Transitions*,
11 644 F. Supp. 2d at 1272. However, the EEOC may not use discovery in the civil suit “as a
12 fishing expedition to uncover more violations.” *E.E.O.C. v. CRST Van Expedited, Inc.*,
13 679 F.3d 657, 675 (8th Cir. 2012) (internal quotations omitted). It may only bring suit “to
14 remedy allegations of discrimination it investigates, finds reasonable cause to believe are
15 true, and attempts in good-faith to conciliate.” *E.E.O.C. v. Carolls Corp.*, No. 5:98-CV-
16 1772 FJS/GHL, 2011 WL 817516 at *3 (N.D.N.Y. Mar. 2, 2011).

17 42 U.S.C. § 2000e–5(b) requires the EEOC to attempt to resolve unlawful
18 employment practices by “informal methods of conference, conciliation, and persuasion”
19 before bringing suit. The EEOC must conduct the proceeding in good faith and may only
20 bring suit if it is “unable to secure . . . a conciliation agreement acceptable to [it].” *Id.*;
21 *Pierce Packing Co.*, 669 F.2d at 608. A good faith attempt requires the EEOC to
22 “respond in a reasonable manner to the reasonable attitudes of the employer and provide
23 the employer with an opportunity to address all issues.” *E.E.O.C. v. High Speed Enter.,*
24 *Inc.*, No. CV-08-01789-PHX-ROS, 2010 WL 8367452 at *5 (D. Ariz. Sept. 30, 2010).
25 However, the requirement of good faith “is an easy burden to satisfy and . . . the EEOC
26 has substantial discretion in determining that conciliation has failed.” *E.E.O.C. v.*
27 *Collegeville/Imagineering*, No. CV-05-3033-PHX-DGC, 2007 WL 2051448 at *2 (D.
28 Ariz. July 16, 2007) (internal quotations omitted).

1 “The relatedness of the initial charge, the EEOC’s investigation and conciliation
2 efforts, and the allegations in the complaint is necessary to provide the defendant-
3 employer adequate notice of the charges against it and a genuine opportunity to resolve
4 all charges through conciliation.” *CRST*, 679 F.3d at 675. Thus, litigation may proceed
5 against a defendant if the defendant “received adequate notice and . . . the charges had
6 been part of the administrative process to a sufficient extent.” *Lucky Stores, Inc. v.*
7 *E.E.O.C.*, 714 F.2d 911, 913 (9th Cir. 1983); *see also E.E.O.C. v. Am. Samoa Gov’t*, No.
8 CIV. 11-00525 JMS, 2012 WL 4758115 at *7 (D. Haw. Oct. 5, 2012) (focusing on
9 whether the EEOC’s investigation and conciliation “provided [the defendant] notice of
10 the . . . claims that the EEOC now seeks to investigate and bring in this action”).
11 Specifically, the purpose of conciliation is to provide the defendant “with an opportunity
12 to confront all the issues.” *High Speed*, 2010 WL 8367452 at *3; *Lawry’s*, 2006 WL
13 2085998 at *2. The adequacy of the EEOC’s conciliation attempts should be viewed on a
14 case-by-case basis. *E.E.O.C. v. State of Ariz., Dept. of Admin.*, 824 F. Supp. 898, 901 (D.
15 Ariz. 1991).

16 The circuit courts have split on what standard to apply in analyzing whether the
17 EEOC has fulfilled its duty to conciliate. *High Speed Enter.*, 2010 WL 8367452 at *2.
18 The Second, Fifth, and Eleventh Circuits have adopted a three-step test that the EEOC
19 must meet to discharge its conciliation duty. *See EEOC v. Asplundh Tree Expert Co.*, 340
20 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534
21 (2d Cir. 1996); *EEOC v. Klinger Electric Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). The
22 EEOC must (1) outline “to the employer the reasonable cause for its belief that the
23 employer is in violation of the Act,” (2) offer an “opportunity for voluntary compliance,”
24 and (3) respond in a “reasonable and flexible manner to the reasonable attitude of the
25 employer.” *Johnson & Higgins*, 91 F.3d at 1534. Conversely, the Sixth and Tenth
26 Circuits have taken a more deferential approach that looks only at the EEOC’s attempt to
27 conciliate without delving deeply into the substance of that attempt. *E.E.O.C. v. Keco*
28 *Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *E.E.O.C. v. Zia Co.*, 582 F.2d 527, 533

1 (10th Cir. 1978). Even in the more lenient circuits, however, the EEOC must “mak[e] a
2 sincere and reasonable effort to negotiate by providing the defendant an ‘adequate
3 opportunity to respond to all charges and negotiate possible settlements.’” *E.E.O.C. v.*
4 *Prudential Fed. Sav. & Loan Ass’n*, 763 F.2d 1166, 1169 (10th Cir. 1985). This Court
5 declines to expressly adopt one approach over another because it finds that the EEOC
6 failed to meet its pre-suit obligations under either standard.

7 **i. Claimants Identified After Commencing Litigation**

8 Currently, the EEOC is seeking relief on behalf of a total of twenty-one claimants
9 who were not identified prior to bringing suit.¹⁶ As discussed above, the purpose of the
10 EEOC’s pre-litigation requirements is to place the defendant on notice of the charges
11 against it and to give it the opportunity to make an informed choice to settle. For these
12 claimants, the EEOC did not give Swissport that opportunity, and the demands it sought
13 during conciliation made such an opportunity impossible without disclosure of the
14 claimants’ identities.

15 In the EEOC’s initial offer of conciliation on June 24, 2010, it requested back pay
16 for four charging parties in the amount of \$61,328.84, non-pecuniary compensatory
17 damages in the amount of \$3,725,000.00, and punitive damages in the amount of
18 \$1,200,000.00. It also sought \$450,000.00 in compensatory damages for members of a
19 class of nine victims. (Doc. 235-32 at 81–82.) What the EEOC sought on behalf of the
20 class in subsequent conciliation proceedings is unclear; the claim for compensatory
21 damages drops out in the EEOC’s next letter to Swissport, (*id.* at 88–89), but returns in
22 the final letter reduced to \$405,000, (*id.* at 93). Swissport repeatedly requested that the
23 EEOC identify the members of the class on whose behalf it was seeking compensatory
24 damages. (*Id.* at 86, 94.) The EEOC never responded to those requests, stating only that it
25 was seeking compensatory damages and that “there is no method to compute

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27 ¹⁶ The EEOC named nine claimants for the first time on June 28, 2011, and
28 another twelve claimants who were not previously identified were permitted to be added
in the Court’s May 10, 2012 order. This makes a total of twenty-one claimants, but two
of them, Gualue and Turay, are time-barred as discussed above in Section IV.E.

1 [compensatory damages] with prevision.” (*Id.* at 88.) Nevertheless, Swissport expressed
2 willingness and interest in conciliating the matter throughout the conciliation process. (*Id.*
3 at 85, 91, 94.)

4 The EEOC asserted at oral argument that Swissport had sufficient notice of all the
5 claims against it because the EEOC had informed Swissport that it sought relief on behalf
6 of a class. It argued that it was not required to disclose the identities of the class members
7 to Swissport. The Court acknowledges that several courts within the Ninth Circuit have
8 held that the EEOC is not required to identify all alleged victims of discrimination before
9 commencing a lawsuit. *Evans Fruit*, 872 F. Supp. 2d at 1110; *Dillard’s*, 2011 WL
10 2784516 at *6. However, “[c]onciliation is . . . a flexible and responsive process which
11 necessarily differs from case to case.” *E.E.O.C. v. Prudential Fed. Sav. & Loan Ass’n*,
12 763 F.2d 1166, 1169 (10th Cir. 1985). Given the facts of the present case, a rule that
13 allowed the EEOC to seek monetary relief for claimants not identified or conciliated prior
14 to bringing suit would not be appropriate.

15 It is undisputed that the EEOC sought compensatory damages on behalf of the
16 unnamed class members. Compensatory damages are calculated on an individualized
17 basis, taking into account the claimant’s future pecuniary losses, emotional pain,
18 suffering, inconvenience, mental anguish, and more. 42 U.S.C. § 1981a(b)(3). “[I]n a
19 section ‘706 case . . . based on one or more *individual* charges or complaints,’ any
20 attempt at meaningful conciliation must have put Defendant on notice as to which
21 *individuals* Plaintiffs were seeking relief for and a basis for the amount of damages
22 claimed for each individual.” *State of Ariz. v. GEO Group, Inc.*, No. CV-10-1995-PHX-
23 SRB, slip op. at 25 (D. Ariz. Apr. 17, 2012) (emphasis in original); *see also State of Ariz.,*
24 *Dept. of Admin.*, 824 F. Supp. at 901 (holding that while “[g]eneralized conciliation is
25 acceptable for prospective relief,” when the EEOC seeks individualized relief like back
26 pay, “there must be evidence of conciliation on the merits of the individual case”). Here,
27 though the EEOC was seeking individualized relief for the members of the class, it
28 sought to conciliate on a generalized basis. Because it refused to provide Swissport with

1 information on the individual claims for which it sought compensatory damages,
2 Swissport was not afforded enough notice to meaningfully participate in the conciliation
3 process.

4 The EEOC points to evidence that it later informed Swissport, at an in-person
5 meeting for conciliation, that the nine class members were individuals who had signed
6 the fuelers' petition to Jim Vescio complaining of Pelkey's conduct, but had not filed
7 charges of discrimination with the EEOC. (Doc. 266-65 at ¶¶ 2–3.) This information was
8 not sufficient to put Swissport on notice of the twenty-one claimants the EEOC added
9 after commencing litigation. First of all, as the EEOC demonstrated at oral argument,
10 only four of the twenty-one turned out to be individuals who had actually signed the
11 complaint letter to Vescio. For twelve of the claimants, it appears that the EEOC did not
12 even try to contact them until late May and early June of 2011, nearly eight months after
13 the litigation began, and well after the Court's deadline for the EEOC to identify
14 claimants. (Doc. 243 at 10.) It cannot be said that Swissport had adequate notice of the
15 claims of these claimants if the EEOC itself did not have notice of them until after
16 commencing litigation. Even for the claimants who had signed the complaint letter to
17 Vescio, Swissport lacked adequate information with which to evaluate its liability. The
18 complaint letter was signed by forty-two individuals. (Doc. 266-71.) Taking out the
19 eighteen individuals who filed charges, Swissport would have had to guess which of the
20 remaining twenty-four constituted the nine class members alleged by the EEOC to have
21 suffered harm in its conciliation letters.¹⁷ Furthermore, the EEOC provides no
22 explanation for why, though it initially asserted that a class of nine members existed who
23 signed the complaint letter, it now brings claims on behalf of only four. It also fails to
24 justify why it should be allowed to bring claims on behalf of twenty-one individuals
25 when it notified Swissport of a class consisting of only nine members. It points to

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27 ¹⁷ The EEOC provides evidence that it miscounted the number of individuals who
28 signed the complaint letter in good faith. (Doc. 266-65 at ¶5.) This does not resolve the
notice issues that Swissport endured during the conciliation process.

1 evidence that it warned Swissport that the class could grow in litigation, but this only
2 shows that Swissport was again faced with an amorphous number of potential claimants,
3 making it impossible for it to evaluate its exposure and meaningfully participate in
4 conciliation. (Doc. 266-65 at ¶ 3.) This constant shifting of the numbers and identities of
5 claimants demonstrates that Swissport was continuously facing a moving target of
6 liability throughout the conciliation process, foreclosing the “opportunity to confront all
7 the issues” against it. *High Speed*, 2010 WL 8367452 at *3. The EEOC’s repeated refusal
8 to identify claimants and explain the basis of its demands shows that it failed to discharge
9 its statutory obligation to conciliate with regard to the twenty-one individuals not
10 identified until after the EEOC brought suit.

11 42 U.S.C. § 2000e-5(f)(1) gives a court discretion to stay the proceedings to give
12 the EEOC more time to “obtain voluntary compliance.” The EEOC argues that the
13 appropriate remedy for defects in its fulfillment of pre-suit obligations “is to stay the
14 litigation to allow the parties an additional opportunity to continue conciliation efforts.”
15 (Doc. 269 at 43.) However, dismissal is an appropriate remedy where the EEOC “wholly
16 fail[s] to satisfy its statutory pre-suit obligations.” *CRST*, 670 F.3d at 917; *see also GEO*
17 *Group*, No. CV-10-1995-PHX-SRB at 20; *Agro Distrib.*, 555 F.3d at 469. With regard to
18 these twenty-one claimants, the EEOC entirely failed to fulfill its pre-litigation
19 obligations. Swissport was not given notice of these claimants or their claims during the
20 EEOC’s investigation and conciliation, even though the EEOC took three years to
21 ascertain the facts of its case. The EEOC had obtained the contact information for all
22 potential claimants at the beginning of its investigation in 2007, but chose to wait until
23 after suit to begin contacting them, and during the conciliation period informed Swissport
24 that if it did not settle, the EEOC would seek to recover for additional claimants that it
25 would identify during the litigation. That is precisely what the EEOC did with respect to
26 the twenty-one claimants. Such a procedure is not authorized by statute. Because these
27 claimants were not even identified until after the EEOC brought suit, it is inappropriate to
28 allow the EEOC to continue to pursue claims on their behalf. Granting the EEOC a stay

1 to attempt conciliation for claimants it had never previously identified would not resolve
2 the failure of notice during the investigation and conciliation period, and would
3 improperly reward the EEOC for using the discovery phase of this litigation to engage in
4 prohibited “fishing” to solicit more claimants. As such, the Court grants Swissport
5 summary judgment on the claims of the twenty-one claimants not identified before the
6 EEOC filed suit.

7 **ii. Seventeen Claimants Identified Prior to Filing Suit**

8 Swissport does not dispute that it had notice of and was aware of the identities of
9 the eighteen original charging parties, seventeen of whom are claimants in the pending
10 case. However, it contends that the EEOC’s claims on behalf of eight of them should be
11 dismissed because the EEOC completely failed to investigate them.

12 As stated above, the EEOC is obligated to make an investigation of any charge of
13 employment discrimination, and must issue a reasonable cause determination if it finds
14 cause to believe that the charge is true. 42 U.S.C. § 2000e–5(b). The statute contains no
15 elaboration beyond stating that the EEOC “shall make an investigation.” However, the
16 Ninth Circuit has held that the EEOC may not bring suit when there is a complete failure
17 to investigate. *Pierce Packing*, 669 F.2d at 608. Courts in this circuit have applied a
18 deferential standard of review in determining whether the EEOC has satisfied its
19 investigatory burden. *Cal. Psychiatric Transitions*, 725 F. Supp. 2d at 1113; *NCL Am.*,
20 536 F. Supp. 2d at 1222; *E.E.O.C. v. Gold River Operating Corp.*, 2007 WL 983853 at
21 *3. (D. Nev. Mar. 30, 2007). As discussed above, the Court reviews not the adequacy of
22 the EEOC’s investigation, but rather the EEOC’s fulfillment of its mandatory statutory
23 pre-suit obligations. Thus, the issue before the Court is not “the nature and extent of [the]
24 EEOC investigation,” but whether the EEOC engaged in any investigation at all. *Cal.*
25 *Psychiatric Transitions*, 725 F. Supp. 2d at 1113–14.

26 Swissport contends that EEOC investigator Jae Richardson drafted charges of
27 investigation for these eight claimants without any basis for believing that the charges
28 were true and thus that the pre-investigation requirement of a valid charge of

1 discrimination was never met. Swissport declares that “Richardson created charges based
2 solely on virtually blank questionnaires and an unsigned and undated letter,” but the
3 portion of the record to which it cites shows Richardson testifying that she drafted the
4 charges based on “the petition . . . and whatever information we have in the file.” (Doc.
5 258-1 at 146:22–147:21.) It identifies portions of Richardson’s deposition in which she
6 admits that, for some of the claimants, there is no EEOC case log record of any interview,
7 but it does not cite to any authority that an interview is required for a charge of
8 discrimination to be valid. (Doc. 258 at ¶ 298.)

9 Swissport further points to evidence that two of the claimants, Crispo and Kual,
10 signed virtually blank intake questionnaires. (Doc. 235-31 at E0000972–975, E0000784–
11 787.) Swissport also presents evidence that the EEOC did not otherwise make contact
12 with Crispo until eight months after he signed the charge. (Doc. 235-35.) At most, this
13 evidence shows that the intake questionnaires were insufficient to support the charges
14 drafted by Richardson. However, as Swissport concedes, both Crispo and Kual signed the
15 charges “declar[ing] under penalty of perjury that the [facts stated] above [are] true and
16 correct.” (Doc. 239 at 18.) The fact that the intake questionnaires are lacking in
17 substantive facts does not establish that Richardson fabricated the allegations in the
18 charge of discrimination, and Crispo’s and Kual’s subsequent signatures on their
19 respective charges is evidence tending to show that those allegations were accurate.
20 Swissport has not established that Richardson fabricated the charges of discrimination
21 based on a non-existent investigation.

22 Swissport also takes issue with the LODs issued for the remaining eight claimants,
23 asserting that the evidence gathered by the EEOC during its investigation does not
24 support the findings in the LODs issued for each of the claimants. (Doc. 239 at 20.)
25 However, as stated above, the Court does not review the EEOC’s investigation for
26 substantive adequacy; rather, we look only to whether an investigation was in fact
27 conducted. Swissport asserted at oral argument that no investigation had been conducted
28 for any of these eight claimants. It points to evidence that at most, four claimants were

1 not interviewed. (Doc. 258-1 (Richardson Dep.) at 83:18–84:16 (admitting that nothing in
2 the EEOC’s case log indicated that Guot had been interviewed or that he submitted
3 anything in writing); 94:6–10 (admitting that there was no case log indication that an
4 interview was ever conducted with Andoh); 187:6–12 (admitting that nothing in the case
5 log indicates that there were ever any communications with Sillah); 195:22–25 (admitting
6 that she could not remember whether she ever spoke with Crispo either telephonically or
7 in person)).¹⁸ However, Swissport does not cite any authority for the proposition that the
8 EEOC must individually interview each claimant in order for it to “investigate” that
9 claimant. Indeed, some of the evidence Swissport sets forth shows that the EEOC did in
10 fact interview some claimants. (Doc. 258-42 at 188:19–189:2 (discussing portions of a
11 case log that indicate that Ngon was interviewed at least once); 199:6–13 (discussing a
12 case log showing that Korsi was interviewed on May 17, 2008)). As such, there is
13 evidence that the EEOC made *some* investigation. Given this admittedly slight evidence
14 that the EEOC conducted some interviews, the Court cannot hold that the EEOC
15 completely failed to investigate. *See E.E.O.C. v. NCL Am., Inc.*, 536 F. Supp. 2d 1216,
16 1222 (*NCL II*) (holding that the EEOC satisfied its duty to investigate when it
17 interviewed two of the seven charging parties, wrote reports of the interviews, and issued
18 LODs for each of the charging parties); *E.E.O.C. v. Nestle Co.*, 1982 WL 234 at *1 (E.D.
19 Cal. Mar. 23, 1982) (holding that only *some* investigation is required). Swissport has
20 therefore failed to show that summary judgment should be granted on these eight
21 claimants.

22 Though there is evidence that the EEOC investigated and that Swissport had
23 notice of the seventeen original claimants, the issue remains whether the EEOC engaged
24 in good faith conciliation on their claims. Several courts, including this one, have found
25 that the EEOC failed to conciliate in good faith when it refused to respond to employers’

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27 ¹⁸ Swissport also points to portions of Richardson’s deposition in which she admits
28 that she cannot remember whether she interviewed a particular claimant; such evidence
does not establish a lack of material issue of fact that Richardson never conducted an
investigation.

1 reasonable requests for information. The EEOC’s conciliation effort must be “sincere and
2 reasonable,” and a court’s evaluation of the process must be made with a focus on the
3 conduct of both parties. *Prudential Fed.*, 763 F.2d at 1169.

4 In *E.E.O.C. v. Bloomberg L.P.*, the EEOC demanded over \$41 million in monetary
5 damages from the employer, Bloomberg. 751 F. Supp. 2d 628, 641 (S.D.N.Y. 2010),
6 *decision clarified on reconsideration* (Dec. 2, 2010). Bloomberg reasonably requested
7 more information about the charges and the basis for the demands. *Id.* at 640. However,
8 the EEOC refused to disclose the requested information—“[t]he most it offered was
9 vague statements that it had interviewed a ‘fair number’ of [claimants] and then
10 extrapolated from those interviews an amount it determined was acceptable for the class
11 claim pool.” *Id.* at 641. Bloomberg and the EEOC “engaged in a vociferous letter-writing
12 campaign” for the next five months, with the EEOC refusing to address Bloomberg’s
13 request for information until Bloomberg made a “reasonable” offer. *Id.* Based on
14 evidence that “the EEOC consistently stonewalled in the face of ‘plainly reasonable’
15 requests from Bloomberg,” the Southern District of New York held that the EEOC’s
16 efforts did not constitute a good faith attempt at conciliation. *Id.*

17 Similarly, in *E.E.O.C. v. High Speed Enterprise, Inc.*, the EEOC made a demand
18 on the employer for \$25,000 to resolve the charge. 2010 WL 8367452 at *4. The
19 employer requested an explanation of how the EEOC determined the value of the claim.
20 *Id.* The EEOC responded that the figure was comprised of back pay, compensatory
21 damages, and front pay, but never set out the basis for its calculations. *Id.* Despite
22 numerous requests for elaboration, the EEOC never provided more specific information
23 for the basis of its monetary demand. *Id.* at *5. This Court therefore found that the EEOC
24 failed to conciliate in good faith based on its refusal “to provide *any* basis for its damages
25 calculations despite Defendant’s repeated requests.” *Id.* (emphasis in original). Other
26 courts have held similarly when the EEOC refuses to provide clarification on how it
27 reached its demands in the conciliation proceeding. *See, e.g., Agro Distrib*, 555 F.3d at
28 467–68; *E.E.O.C. v. La Rana Haw., LLC*, No. CIV. 11-00799 LEK, 2012 WL 3638512 at

1 *24 (D. Haw. Aug. 22, 2012); *E.E.O.C. v. Evans Fruit Co., Inc.*, No. CV-10-3033-LRS,
2 2012 WL 1899194 at *7 (E.D. Wash. May 24, 2012).

3 Here, the EEOC's initial offer of conciliation on June 24, 2010 requested back pay
4 for only four charging parties in the amount of \$61,328.84, non-pecuniary compensatory
5 damages in the amount of \$3,725,000.00, and punitive damages in the amount of
6 \$1,200,000.00. Swissport responded on July 23, 2010, requesting more information on
7 the basis for the alleged damages. (Docs. 239 at 21; 235-32 at 86.) Swissport contends
8 that the EEOC was continually evasive in providing this information.

9 In its Response, the EEOC points to its July 30, 2010 letter in reply to Swissport's
10 requests. There, the EEOC named the four charging parties for whom it was seeking back
11 pay and stated that the basis for its calculation was "the difference between the Charging
12 Parties' actual earnings and the amount the Charging Parties would have earned absent
13 the discrimination." (Doc. 235-32 at 88–89.) This, however, merely states the definition
14 of back pay, and does not indicate how the EEOC arrived at the figure. Similarly, in
15 response to Swissport's request for the basis of the amounts requested for compensatory
16 and punitive damages, the EEOC stated that "there is no method to compute these
17 damages with precision." (*Id.* at 88.) The lack of clarity here is similar to the EEOC's
18 nebulous responses in *Bloomberg*.

19 In a letter dated August 11, 2010, Swissport wrote that it was willing to pay the
20 \$61,328.84 requested by the EEOC in back pay, *provided that* the EEOC disclose the
21 documentation it used in calculating that amount. (*Id.* at 90.) It also requested more
22 information on the factors the EEOC took into account in demanding \$3,725,000.00 in
23 compensatory damages. (*Id.*) In the interim, without this information, it made a good-
24 faith offer of \$30,000 total. (*Id.* at 91.) The EEOC responded to neither of Swissport's
25 requests for information, writing back only that Swissport's counteroffer was "wholly
26 inadequate." (*Id.* at 92.) In a letter dated August 20, 2010, Swissport again expressed that
27 it was unable to evaluate the EEOC's claims of discrimination without information on the
28 EEOC's basis for its monetary demands. (*Id.* at 94.) In response, the EEOC again avoided

1 the request for more information, focusing instead on “the considerable difference in the
2 parties’ positions.” (*Id.* at 96.) Though Swissport indicated throughout the
3 correspondence that it may be willing to increase its offer with more information on how
4 the EEOC was calculating its demands, the EEOC never disclosed that information.

5 Moreover, the EEOC’s final letter to Swissport on September 1, 2010, stated that
6 its initial letter requested “damages on behalf of 27 victims (eighteen charging parties and
7 nine class members.” (*Id.*) Yet the initial letter mentions only four charging parties and
8 nine class members. (*Id.* at 81.) Again, this inconsistency reveals that Swissport was
9 faced with a moving target of liability throughout the conciliation process, making it
10 practically impossible for Swissport to accurately confront the issues before it. *High*
11 *Speed*, 2010 WL 8367452 at *3; *Lawry’s*, 2006 WL 2085998 at *2.

12 Though the EEOC eventually held an in-person conciliation meeting, at no point
13 did it provide Swissport with the basis for its calculations of back pay, compensatory
14 damages, and punitive damages. (Doc. 266-65 at ¶ 3.) Swissport sent a total of three
15 letters requesting this information, but the EEOC never disclosed it. (Doc. 235-32 at 85–
16 87, 94–95.) Swissport therefore had no information with which to evaluate its liability on
17 those claims. Without this information, it was unable to make a meaningful offer of
18 settlement. The EEOC, in withholding this information, failed to respond “in a reasonable
19 and flexible manner to the reasonable attitude of the employer.” *High Speed Enter.*, 2010
20 WL 8367452 at *3.

21 While the EEOC’s burden to attempt conciliation is not a heavy one, it is not a
22 mere formality. *High Speed Enter.*, 2010 WL 8367452 at *3. “[C]onciliation is ‘the
23 preferred means of achieving the objectives of Title VII.’” *Id.* (quoting *Pierce Packing*
24 *Co.*, 669 F.2d at 609). Swissport’s evidence that the EEOC repeatedly refused to provide
25 information necessary for Swissport’s evaluation of the claims against it shows that the
26 conciliation efforts in this case were neither bona fide nor reasonable. The EEOC has not
27 proffered any evidence in response that shows it provided even a minimum of
28 information in response to Swissport’s reasonable requests. As such, it has failed to raise

1 a material issue of genuine fact as to its failure to conciliate in good faith.

2 The typical approach taken by courts upon finding that the EEOC failed to
3 conciliate in good faith is to stay the litigation to allow the parties another chance to
4 informally resolve the issue. *Bloomberg*, 751 F. Supp. 2d at 643. However, the district
5 court retains discretion to stay or dismiss the matter. *High Speed Enter.*, 2010 WL
6 8367452 at *6. Where the EEOC has at least made an attempt to conciliate the
7 employment violations, a stay is preferable. *See E.E.O.C. v. Crye-Leike, Inc.*, 800 F.
8 Supp. 2d 1009, 1019 (E.D. Ark. 2011) (granting a stay because it was “not the case . . .
9 that the EEOC . . . made absolutely no efforts to conciliate”); *High Speed Enter.*, 2010
10 WL 8367452 at *6.

11 The Court finds that the EEOC did make an attempt to conciliate for the seventeen
12 initially identified claimants. The EEOC eventually mentioned in a conciliation letter that
13 it was seeking relief for the eighteen claimants who filed charges of discrimination (one
14 of whom has since dropped out of the litigation). (Doc. 235-32 at 96.) Thus, the
15 appropriate solution here is not to dismiss the claims of these seventeen claimants but to
16 stay the litigation for sixty days to allow the parties another chance to conciliate the
17 claims with respect to the seventeen identified claimants.

18 CONCLUSION

19 Swissport’s Motion for Summary Judgment is granted on the hostile work
20 environment claims of Ngon, Crispo, Abaker, Korsi, Sillah, Aguek, and Maja, but denied
21 on the claims of Gindallang, Kual, Maduok, Mil, Obur, Peter, Imeah, Basha, Aruo, Lado,
22 Aculey, Olai-Chu, Dada, Gualue, Marh, Aba, and Turay. Its Motion is granted on Korsi’s
23 constructive discharge claim because of the EEOC’s failure to put Swissport on notice of
24 the claim. Its Motion for Summary Judgment on the ground that the EEOC improperly
25 expanded the scope of its claims is otherwise denied.

26 Swissport’s Motion is denied as to Olai-Chu’s failure to promote claim. It is also
27 denied as to the retaliation claims of Korsi, Torue, Andoh, Ngon, Aguek, Maduok, and
28 Mil; however, it is granted as to Aba’s retaliation claims. Swissport’s Motion is granted

1 on the claims of Gualue and Turay on the ground that they did not timely file charges of
2 discrimination with the EEOC. Finally, Swissport's Motion is denied on the punitive
3 damages issue.

4 Because the EEOC failed to meet its pre-suit obligations as to the twenty-one
5 claimants not identified until after litigation commenced, those claims are dismissed
6 without prejudice. The EEOC also failed to reasonably respond to the reasonable requests
7 of Swissport during the conciliation process and thus it did not meet its statutory
8 obligation to attempt conciliation of Swissport's unlawful employment issues in good
9 faith. However, the EEOC at least went through the motions of conciliation for these
10 seventeen claimants, so litigation will be stayed for sixty days to allow the parties to
11 attempt a second conciliation on these claims.

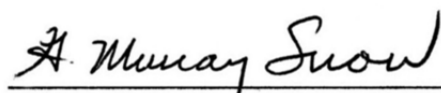
12 **IT IS THEREFORE ORDERED** that the Motion for Summary Judgment of
13 Swissport Fueling, Inc. (Doc. 239) is **GRANTED IN PART and DENIED IN PART**.

14 **IT IS FURTHER ORDERED** that the Motion to Strike (Doc. 279) of the Equal
15 Employment Opportunity Commission is **GRANTED IN PART and DENIED IN**
16 **PART**.

17 **IT IS FURTHER ORDERED** that the Motion for Leave to File Surreply (Doc.
18 280) of the Equal Employment Opportunity Commission is **DENIED AS MOOT**.

19 **IT IS FURTHER ORDERED** that the litigation is **STAYED FOR SIXTY (60)**
20 **DAYS** pending the parties' conciliation efforts. The parties are directed to file a Status
21 Report **within five (5) days** after the sixty (60) day period has expired. If no report is
22 filed, the Court will set this matter for a final pretrial conference.

23 Dated this 7th day of January, 2013.

24 
25 _____
26 G. Murray Snow
27 United States District Judge
28